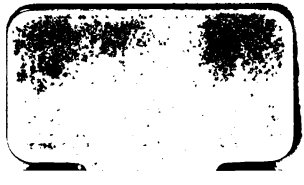

J. H. 1826.

DOUBTFUL QUESTIONS

IN THE

LAW OF ELECTIONS

STATED AND CANVASSED.

BY

CHARLES EDWARD DODD,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

Si quis a certis ordiatur in dubia desinet: sin a dubiis incipiat, eaque aliquamdiu patienter toleret, in certis exitum reperiet. ——

BACON DE AUGMENT. SCI.

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CHAPTER I.

OF THE DISQUALIFICATION OF A VOTER ARISING FROM PAUPERISM.

The receipt of alms, parish relief, or charity funds, is held in many cases an established objection to a voter, on the alleged ground, that a person so indigent as to depend for subsistence on others, is to be presumed without an independent will of his own. As this objection obviously assumes a similar shape to those of alienage, minority, insanity, &c., tending to disqualify the voter as not strictly *sui juris*, on general legal principles it would seem that it should be strictly made out, and not received with encouragement. That it is, however, settled to be in many cases a valid objection cannot be questioned, and the only doubt is, as to the precise principle on which it rests, and the exact extent to which it operates. In the numerous cases where the right of election is settled in particular places by agreement, or last determination of a committee, to exclude persons "receiving alms," or "receiv-

ing alms or charity," the question is, of course, beyond doubt. So, also, where a local usage is proved to exclude such persons. And as little doubt appears to exist in principle in those cases where pauperism is directly and necessarily inconsistent with the possession of the particular qualification to which the franchise is annexed, as in cases where the right is in Inhabitants paying scot and lot and Potwallers. [*Great Grimsby*, 1 *Peckwell*, 59. *Wootton Basset*, 1819. *Male on Elect.* p. 166.] In none of these cases is it at all necessary to resort to the ground of a general disqualification at common law. In the first class of cases, the determination of the House of Commons, made conclusive by 28 *Geo.* 3. *c.* 52. *ss.* 25—27., and in the second the local usage has limited the right of election in the particular place by the express exclusion of persons in receipt of alms, &c.; and in the last case the receipt of alms, when proved, obviously and directly goes to negative the possession of the particular franchise; since it is clear that a person subsisting on parish relief, or charity funds, can neither be an inhabitant, *contributing to parish burdens*, nor can he come within the description of a Potwaller, that is, a person *furnishing his own diet*. [1 *Doug.* 371.] The inference, indeed, is not quite so direct when the exclusion is on the ground of receipt of alms by the wife or child of the voter; (to which

extent the principle is carried, [*Great Grimsby*, 1 *Peck.* 71. *Okehampton*, *ibid.* 373.] — but still there is a strong *primâ facie* presumption at least, that the party whose wife or child is left to subsist on alms cannot be himself in condition to contribute to parish rates; and it is no very violent narrowing of the definition of a pot-waller to hold a person not within it, who though he may support himself, leaves those whom he is bound to support to live on parish relief or charity. These cases, therefore, fairly rest on the indisputable ground that the condition of pauperism is repugnant to the nature of the particular franchise, and they require no support from any principle of common law disability. It is unnecessary, therefore, here further to notice them.

But the decided cases go much beyond this line; and the reasonings and arguments in the reports and works of text writers frequently treat pauperism as a personal common law disqualification, incapacitating the voter in all cases, whatever may be the nature of the particular franchise. [2 *Doug.* 331. *Heywood C.* 167.] It is considered as a legal presumption, that parish poor and persons receiving aid from charitable funds have no independent will of their own — it is said that at common law only those could vote who could contribute to the expences of representatives — that pauperism

being the fact to be ascertained, the receipt of alms or parish relief is the best evidence of the fact — that the decisions of the House of Commons either expressly limiting the right of election in particular places to persons not receiving alms, or rejecting particular votes on this objection, are so numerous, and applied to such various species of franchise, that they cannot be referred to any less extensive principle than that of a general incapacity at common law — that these determinations are declaratory of the common law — that there is no resolution where the House has resolved that such persons were not disqualified — and that in one case [*Sandwich*, 1690, 10 *Journ.* 457. *Heywood C.* 167.], where the committee reported a usage for them to vote, the House disagreed. And first, it will be convenient shortly to review the decisions, and next to consider the general reasonings on the question. In cases where the franchise is strictly personal, as in freemen and other members of corporations, or where it is in its nature real, as in freeholders, (whether in counties, cities, or boroughs,) in holders of burgage tenements, or in inhabitant *householders*, (it is convenient, and perhaps not very inaccurate, to class this last with real qualifications, as it falls within the same principle,) in these cases, as the fact of pauperism does not in any way go to impeach the voter's possession of the specific qualification, it

would appear that it can be a valid objection to his vote, only on the ground of a personal disability, arising from his destitute condition affording a presumption in law against the independence of his will. It is therefore important to enquire how far the authorities have allowed the objection in cases respecting franchises of this nature.

1st. In cases where the right of voting is entirely personal (as in "freemen," "inhabitants," &c.) there are two old resolutions, affirming the right of almsmen to vote. In *2 Journ.* 351., it is stated to be proved at St. Albans, that almsmen "had voices time out of mind," and decided, "that they ought to have voices;" and the person for whom they had voted was duly elected. [*Heywood C.* 264. *2d edit.*] However, as the right of election at St. Alban's was settled, in 1716, to be confined to "such householders only *as pay scot and lot*," the former resolution is virtually repealed. So at Chester, (where the right is in *freemen,*) 2d December, 1690, it was proved almsmen had always voted. [*Heywood C.* 265. *2d edit.*] *Sandwich*, 31st October, 1690, the right of election was agreed to be in freemen of the port, inhabiting within the port. Mr. Brent had 124, and Mr. Mitchell 114 votes. The former was returned, and the latter petitioned. In order to give himself a majority, Mr. Mitchell objected to thirty of the opposite

voters as almsmen. But it appearing to the committee that freemen in general had always voted, they came to two resolutions: — 1st, "That it is the opinion of the committee that the freemen of the port of Sandwich inhabiting within the said port, *although they receive alms*, have a right to vote in electing barons to serve in Parliament." 2d, "That Edward Brent, Esq. was duly elected." [10 *Journ.* 457.] The first resolution being reported, the question was put, that the House do agree with the committee; and it passed in the *negative*: and yet, singularly enough, the House agreed in the second resolution, by a majority of *one*, that Mr. Brent was duly elected; though, if the almsmen were excluded, the numbers were clearly against Mr. Brent. Without enquiring by what parliamentary arithmetic these conflicting resolutions are to be reconciled, the first resolution is not only a strong authority against the right of almsmen and poor to vote in respect of the franchise of freemen, but it would appear from it as if the House must have proceeded on the principle of a general disability in paupers, which could not be got over, by the express evidence proving, to the satisfaction of the committee, a usage to receive their votes in that particular place. In the Sudbury case, 1780, (where the right is in freemen,) seven voters for the sitting member were disallowed, on the ground of parish relief

received within the year, as appears by the state of the poll. [1 *Phillips' Ca.* 213.] In the Cirencester case, (where the right is in inhabitant householders,) [2 *Fraser*, 453.] objection was taken to several votes, on the ground of the voters having sent their children and servants to the pest-house on the breaking out of the small-pox, where they were attended by the parish apothecary. The Committee resolved that such persons "whose families had been admitted into the pest-house on account of the small-pox, without receiving any *other parish relief*, were not disqualified;" which seems to imply, that ordinary parish relief would have been held a disqualification. So in the case of Oakhampton, [1 *Peck.* 373.] (where the right is in freeholders and freemen,) the vote of a freeman was held bad, on the ground of his having a child of five years old maintained in the workhouse.

In many corporations the receipt of parish relief is, according to the bye-laws or usage of the corporation, of itself, a ground for disfranchising the pauper, and striking him off the roll of freemen; and, of course, in such case his right of voting is suspended or destroyed, from the time of his being actually struck off, but not before. [1 *Peck.* 59.] An objection of this sort was made in the case of Great Grimsby, [1 *Peck.* 59.] and it was made in this shape, since it could not be sustained on the ground of

general incapacity as a pauper, since the voter was a militia-man, and the relief was given to his wife — and the 18 *Geo.* 3. *c.*59. *s.*25. * provides, " that any relief given to the family of a militia-man during actual service shall not deprive such militia-man from voting for the election of any member to serve in Parliament."

But the cases above stated proceed on no special ground of the voter having lost his freedom, according to the laws of the borough, by the receipt of alms, but on the general objection, that admitting his character of freeman, the receipt of alms operated to disqualify. There are other decisions to the same effect, and none the contrary way; so that where the franchise is personal, it would seem that the receipt of parish relief or charity is settled — so far at least as authority goes — to be a valid objection to a voter.

2d. In the cases of county elections, the authorities are not equally uniform, and as there appears to be no distinction between these cases

* No inference can be drawn from this enactment that the legislature considered receipt of parish relief a general disqualification at common law. It having been settled before the passing of the act that it was a disqualification *in many cases*, the act only meant to provide that relief given to the family of a militia-man in service should not be held to disqualify in those cases in which parish relief in general was held to have that operation.

and those of other franchises of a real nature, we will shortly notice them together. In later times, as the value of money has diminished, instances have not unfrequently occurred at county elections, of voters in possession of 40*s.* freeholds being nevertheless proved to be receiving parish relief or charity — and they have been often held disqualified on that ground. — Thus, in the contested election for Essex, in 1716, tried before the Committee of Privileges and Elections, the Chairman in his report to the House, in summing up the votes disqualified by evidence, states four disqualified for the petitioner as "receiving charity." [18 *Journ.* 447. *Heywood C.* 171. 2 *Luders*, 584.] In the Yorkshire petition in 1735, it is stated as an objection, that several polled which were only "hospital men *and received alms*," [22 *Jour.* pp. 499, 500.] but the petitioner does not appear to have brought evidence in support of the objection; and in the case of Oxfordshire, 11th March, 1755, a voter was disqualified, "as receiving alms, and as not being in possession of the freehold for which he voted," and on the 15th March, others were disqualified as not properly assessed, and "as being almsmen." [*Heyw. C.* 270.] In the Gloucestershire case, Mr. Luders states, "that "the objection was reckoned in the lists of those "whom the petitioner disqualified, and was like-"wise made use of by the sitting member, al-

" though in another part of the case, the com-
" petence of it was denied on his part; but this
" was in the case of a particular charity, as dis-
" tinguished from parish relief. And it is with
" reference to such cases, that I should under-
" stand the chairman's observation in his book,
" in which he treats the question as undecided.
" For otherwise that is inconsistent with one of
" the resolutions of that committee, in which,
" after argument, they permitted evidence to be
" given of the receipt of parish relief, in order to
" disqualify a voter, thereby plainly deciding the
" question. See pages 84. 125. 178, 179, 180. of
" the resolves of that Committee, in the last of
" which the chairman adds a N. B., ' that the
" case of *parish poor was not argued*' " [2 *Luders*, 565. *note*]; from which it would rather appear that the objection of parish relief was admitted without dispute, and that the only question was, as to a voter in receipt of a certain charity.

The resolution of the Cricklade committee was on the vote of a freeholder of one of the adjoining hundreds, entitled to vote for the borough, under the 22 *Geo.* 3. *c.* 31. The committee, after hearing counsel on both sides, resolved, " that Robert Strange, having within twelve months before the election received parish relief, was thereby disqualified from voting," and the principle was entirely admitted on objections to other votes at the same election. [2 *Luders*, 328. 567.]

In the case of Downton, [1 *Luders*, 109.] a burgage-tenure borough, where the right of election was agreed to be "in the freeholders of antient burgage tenements, holden of the lord of the borough on the usual conditions," the objection of parish relief was made to one voter, but the vote was rejected on another ground. Another voter was objected to on the ground of receiving an annual charity, called Stockman's charity, which was directed by the Trust deed not to be employed to the increase of the parish church-box, and not to be accounted an abatement of any relief usually provided for the poor of the parish, and the practice was not to give it to those receiving parish relief. Against the vote it was argued, that the receipt of the charity showed the party to be in a state of dependant poverty — that there could be no difference in this respect between votes in right of burgage tenures and those in other rights; for the right, though annexed to the soil, was subject to the ordinary legal disqualifications, as women, infants, &c. were held incapable of exercising it — that the case of the borough of Westbury, 1st June, 1715, went a great way to determine this, for by that resolution concerning a borough of burgage tenure paupers were disqualified. "Resolved, that the right of election of members to serve in Parliament for Westbury, &c. is in every tenant of any burgage tenement in fee for life, or

ninety-nine years determinable on lives, or by copies of court-roll, paying a burgage rent of 4*d.* or 2*d.* yearly, being resident within the borough, and *not receiving alms.*" In support of the vote, the counsel argued that the objection, whenever made, was considered an unfavourable one — that the case of Westbury was not applicable, since there the right was not properly in burgage tenures, but a mixed right, and that even if *parish relief* disqualified, this charity would not come under the same rule, according to the decisions in the Bedford case, [2 *Doug.* 94. 113.] and that it ought at least to have been shewn, that the charity was received after the voter acquired his right, which had not been proved. The committee resolved to admit the vote, but on which of the above grounds does not appear. In the case of Haslemere, another burgage-tenure borough, [2 *Doug.* 319.] six votes were objected to, on the ground of receiving a charity, called Smith's charity; and one was objected to, as having received parish relief, "if the committee should think that a disqualification." The same sort of arguments were used by the counsel as are above noticed, but the reporter states, that "the nature of the case was such as to render it impossible to deduce from the general determination of the committee, their opinion on the particular points."

The cases above stated are certainly all either direct authorities for the disqualification or of no weight one way or the other; and on examination those of Essex, Cricklade, and Gloucestershire, are perhaps the only cases fairly to be considered authorities on the point, since in the Yorkshire case the objection being that the voters were "*only hospital-men and received alms,*" would, perhaps, warrant an inference that they were dwelling in the hospital, and not *in possession* of their freehold, which is an undoubted objection — and besides no evidence was offered — in one of the Oxfordshire cases, the voter disqualified was expressly stated "not to be in possession," — and in the other, "not to be properly assessed." In the Downton case, the vote was received, though on what ground does not appear — and in the Haslemere case the decision is not known.

There is, however, a case *posterior* to these, and determined a few days subsequent to the Cricklade case, and on a review of that case, and on full discussion by counsel, where the committee twice resolved, that the receipt of parish relief was no disqualification of a 40*s.* freeholder, provided he remained in possession of his freehold. [*Bedfordshire case, 2 Luders,* 564. 567.] John Houghland was objected to as having received parish alms within a year before the election. In support of the objection it was

said, that if it held against voters in boroughs, it ought to hold *à fortiori* in counties, where the right of voting is to be derived from property, and is not a personal right — that though there was no express resolution in the Journals applying to counties, yet it had been always understood to be equally an objection in them as in boroughs — that the Cricklade committee had a few days before passed a direct resolution in confirmation of it, and their authority made it *res judicata*. On the other side it was said, that the reason for considering the receipt of alms as a disqualification in boroughs, was because of the person thereby becoming a dependant member of society, without property to maintain him, — that in such a case it was a *personal disqualification* from exercising a *personal* right. But that in counties, a freeholder possessing 40*s*. a-year was the only necessary qualification, and while that remained with him, the law would not suppose him to be in a state of indigence. That it ought rather to be presumed, that his receipt of alms was only accidental, because the parish need not have relieved him, if he refused to give them up his property, which they might have required from him; and that their suffering him to retain it argued that he was not considered by them as one of their ordinary poor. The Committee held the vote good. The following motion, "that parish alms paid to a freeholder do invalidate his

vote, although he continues in possession of a freehold of the clear yearly value of 40*s.*" passed in the *negative.* [2 *Luders*, 564.] On a subsequent vote at the same election, a dispute arose as to the meaning of the resolution above stated, which the committee explained to mean, " that parish relief made no disqualification while the voter retained the possession of his freehold." It appeared that the voter received parish relief, but was in possession of his estate, from which he derived 40*s.* a-year, and the committee allowed the vote to be good. [2 *Luders*, 567.] No decision on the point subsequent to that of the Bedfordshire committee is to be found in the Journals or Reports in the case of a county election, or of any election where the franchise is of a *real* nature; and it is stated in several modern works on election law, that the question is now understood to be settled as to freeholders conformably with the Bedfordshire case. [*Male on Elect.* p. 293. *Rogers on Elect.* 126.]

If the point is settled as to freeholders, it will then become a question how their case is to be distinguished from that of freemen. Now, if the Bedfordshire case went on the principle suggested by counsel in argument, that the voter being in possession of his freehold, the law would not presume him to be in a state of indigence, it cannot be taken for a general authority against the existence of a common law disability

in paupers; on the contrary, it would seem to admit such a disability, but to hold that the voter being in possession of the required freehold, was not brought within it,—that the inference of indigence was rebutted by the possession of the freehold. And in this view the case would not appear inconsistent with the decisions in cases of personal franchise, which can only have proceeded on the ground of common law disability, and where the same presumption against indigence might not necessarily arise from the possession of a mere personal qualification. But if, on the other hand, the Bedfordshire case went on the broader, and, as I humbly submit, the sounder principle, that the party possessed of the specific statutory qualification was entitled to vote without any further inquiry into his circumstances, since pauperism works no general disability, and in this case clearly does not negative the specific qualification, then the principle of the decision would seem equally to apply to any specific franchise, real or personal, and would, therefore, directly tend to shake the decisions, excluding paupers in cases of personal franchise. In either view of the Bedfordshire case, it is plain that it is directly opposed to the Essex, Gloucestershire, and Cricklade cases; and as those cases may not, perhaps, be considered as authoritatively over-ruled by this single decision, the question

as to votes of paupers in counties, and other cases of real franchise, and still more the question as to the principle of common-law disability, would appear not so determined as to preclude general reasonings.

From the last determinations of Committees, settling the right of voting in particular places in exclusion of paupers, it would at first sight appear to be inferred, that a local usage to exclude them had been proved, and that in places where the determination has no such restriction the objection would not be tenable; but as there is reason to suppose that local usage has in fact not been the foundation of these resolutions, but probably the restrictive words have been introduced in those cases, where it happened that pauper votes had been discussed and rejected in the course of the proceedings, and omitted where no such question had arisen, it cannot be concluded that these resolutions proceeded on the ground of local usage; and the number of these restricted resolutions, applying to almost every species of town or borough franchise, would also lead to the contrary inference, and would seem to show that the Committees must have decided on the notion of some general parliamentary or common law incapacity arising from the fact of pauperism; and the first resolution in the Sandwich case, where the House disregarded the local usage proved

strongly supports such an inference. Supposing, however, that such were the ground of many, or even all, of these restricted resolutions, still they cannot be held to have settled the principle by their authority — since they are only decisive on the particular right of election in the particular place — the principle which guided the resolution cannot be legitimately and certainly got at — and even if it could, it may have been erroneous, and the resolution cannot in such case have established it as a general law, so as to preclude its being questioned in any other case.

But it is said, that paupers cannot vote, because none could originally vote who did not contribute to the expenses of members. Admitting for a moment this very doubtful fact, it would certainly afford a good reason for excluding them, if the contributing to expenses were *now* a condition annexed to the right of voting; but when such a condition is altogether abolished, and the writs *de expensis* have ceased for some centuries, it is a singular argument to use, that paupers *now* are incompetent to vote because they are not in a situation to fulfil what would have been a condition precedent to their voting had they come to the poll four centuries ago. — Assuming that voting and contributing were once always concurrent, paupers were undoubtedly *contributable*, if they happened to possess

the legal qualification. The inability to contribute *in fact*, might at that time be a good objection to the voter *pro hac vice*; and if at the next election he could contribute, he would then vote. But the ability to contribute was never the *essential* qualification: it may have been — though this is not certain — a mere *incidental* requisite, and if so, it has now entirely fallen away, and with it all objection arising from such inability has of course in principle ceased. Papists cannot now vote, on account of the test-oaths which may be required of them: but, supposing the oaths repealed, could it be said to them, "You cannot vote, because formerly none could vote but those who took the oaths?" The answer would be, "I have the freehold, or the freedom, &c. which is the only qualification *now* required by law. Show me any other condition which the law requires me to fulfil." In the same manner may the pauper now say, "I am in possession of my statutory freehold, or my freedom of a corporation: this being the only legal qualification required, on which all other persons are admitted to vote (except aliens, minors, women, and idiots), by what right is more required of me? Show me the law which says that, being possessed of these, I am still to be examined as to my pecuniary sufficiency, and that if I have a child or wife in the workhouse, or have received charitable aid within a year, my

freehold, or my freedom, are to go for nothing. If such is the law, where is it to be found? At all events, do not tell me I cannot vote, because, had I lived several centuries ago, I could not have contributed to the expenses of a member, when the candidate, who now solicits my vote, seeks for no money, and would accept none if I could give it." But in point of fact, nothing can be more doubtful and obscure than the question, Who were the persons paying the wages of members under the old writs *de expensis*, or under agreements among the electors, made to obviate compulsory process. At all events, the contribution was not a condition precedent to the vote, since the writs to levy expenses were always granted subsequent to the return, on the petition of the member. — [See *Prynne's 4th Register*, *passim*. *Hallam*, vol. iii. pp. 27. 170.]

In the early stages of representation there can indeed be little doubt that persons in the condition of paupers did not, in point of fact, vote; but why? — not on the ground of any general disability, arising from indigence, but because such persons would at that time seldom, if ever, be found in possession of the requisite legal qualification. The freeholders in the county court (whether including mesne tenants, or confined to tenants *in capite*, as to which a doubt exists, [see *Hallam*, vol. iii. p. 25]) must, according to the value of money and rate of provi-

sions in those times, have been persons of a condition considerably raised above indigence. And although the nature and character of corporation franchises are involved in much obscurity, there is no reason to suppose that any persons within the *freedom* were in early times ever in so low a condition as to be supported by others; and even if the elective franchise for boroughs was (as some writers assert) originally in the possession of all Inhabitants, still this wide description would probably, at that time, rarely include any persons absolutely indigent. Such persons, in an early stage of society, when population was thin, and anterior to any legal system of parochial relief, probably would be found existing only as mere mendicants and houseless dependents on casual bounty, not bound within any guild or social community, even by the slight bond of mere inhabitancy. But because paupers were not originally in possession of the specific qualifications of voters, is that a reason for now excluding them when they are found undeniably to be so? If policy requires that they should be excluded, and that the elective franchise should be confined strictly to such classes as originally possessed it, this is a work for the legislature to accomplish, but which Committees of the House of Commons, acting in a judicial character, administering, and not making law, cannot effect, unless existing legal principles are

to be found sufficient for the purpose. The legislature has already found it necessary to make one change. Why did parliament interpose by raising the freehold qualification to 40*s.* by the statute 8 *Hen.* 6. *c.* 7., if the House of Commons could, on legal principles, have disqualified the "outrageous and excessive" "people of small substance and no value" whom the act was passed to exclude? and yet why might not such diminutive freeholders have been held disqualified on the ground that they were not the class and kind of persons who were electors at the origin of representation, if parish poor can be now excluded when in possession of the legal freehold or corporate qualification, because freeholders and corporation freemen did not happen in the days of Edward I. to subsist on alms or parish relief?

There is no doubt that the general spirit of the law is (as unquestionably it ought to be) to look for some degree of substantiality of condition in electors: but the question is, when acts of parliament in counties, (whether corporate or otherwise) and charters and usages in boroughs have precisely defined and accurately settled what the qualifications are which are to be required as indicative of that substantiality, whether a judicial tribunal is not strictly precluded from looking any further into the condition of parties so qualified—and whether the

law authorises an enquiry whether the *duly qualified elector* has received parish relief, or had recourse to eleemosynary assistance within a year before voting. That he is not the less a *qualified elector* on these grounds is evident; and certainly Lord Coke never considered that pauperism could operate as a general disability to vote; for, in speaking of those persons who are bound by laws, though they have no voices in making them, he only mentions aliens, minors, women, and insane persons. [4 *Inst.*] If the pauper cannot vote, on the ground of a general personal disability, upon that principle, can he lawfully contract or execute valid instruments? A common law disability applying to one single act, and creating no incapacity as to others, is surely an anomaly in the law. If such a disability exists, the enactment of the statute 11 *Geo.* 1. *c.* 18. *s.* 14. is clearly nugatory, since it expressly enacts, that no person shall have any right to vote at any election of a citizen to serve in parliament for London, who has, at any time within two years before the election, received any alms whatsoever. It may be said, the act is declaratory of the common law—but it has no declaratory language.

I forbear to make any remarks on the kind of evidence by which the indigence of the voter is established when the objection is taken, viz. proof of the receipt of parish relief by himself, his wife, (although separated,) or his children—

or to notice the confliction of the cases on the subject of the sort of charities which are to be held to disqualify the receiver. The principle of the objection is the only point here considered. If pauperism is held a legal disqualification, perhaps the criteria adopted to ascertain its existence are as certain as the nature of the case admits. And I abstain also from hinting at the various other circumstances which certainly tend no less than pauperism to indicate a subjugated will in the voter, and a subservience to the influence of others in making his choice, and which might, therefore, on the same principle, be considered as available objections. These considerations would be foreign to my object, which is not, by any means, to question the policy of excluding paupers from electing, but humbly to enquire on what principle and to what extent the existing law warrants such exclusion.

CHAP. II.

OF VOTES ARISING FROM PURCHASED LAND-TAX IN BOROUGHS.

PURCHASERS of unredeemed land-tax on property within counties have since 42 *Geo.* 3. *c.* 116. *s.* 154. been considered to enjoy an unquestionable vote in county elections in respect of such purchased land-tax; but doubts have been thrown out as to the right of purchasers of land-tax on property within boroughs, where the elective franchise belongs to freeholders to vote in respect of such purchases in a similar manner. It would appear, however, that such votes were admitted at the two last general elections for the borough of Aylesbury, (*Male on Elect.* 331.) and there seems to be no solid ground on which they can be distinguished from similar votes at county elections, or on which even a plausible argument can be raised against their validity. The question entirely depends on the 42 *Geo.* 3. *c.* 116. *ss.* 154. and 200., and the 51 *Geo.* 3. *c.* 99.

The 154th sect. of 42 *Geo.* 3. *c.* 116., after directing the manner of the contract and purchase of the tax, enacts, "that the respective purchasers of such land-tax and their heirs, successors,

and assigns, shall be entitled to have and receive for their, his, or her own use for ever, and shall, by virtue of that act, be adjudged, deemed, and taken, to be *in actual seisin and possession of a yearly rent or sum as a fee-farm rent* equal in amount to the land-tax so purchased, free of all charges and deductions, to be issuing and payable out of the manors, messuages, lands, tenements, or hereditaments wherein the land-tax so purchased was charged, on the same days as the land-tax was payable at the purchase thereof; and such respective purchasers, their heirs, successors, and assigns, shall have priority of security of such manors, messuages, lands, tenements, or hereditaments in respect of such annual sum or rent over every other incumbrance thereon; and shall have and enjoy all such powers, remedies, benefits, and advantages, for the recovery thereof, whether by action, suit, distress, or otherwise, as landlords by law have or can enjoy for the recovery of rents reserved on leases." The purchasers of land-tax, pursuant to this clause, becoming thus seised of a freehold rent, charged upon and issuing out of the lands or tenements exonerated from the land-tax, acquire a freehold interest in the place where the hereditaments are situate, and must consequently enjoy whatever elective franchise is in that place annexed to such freehold interest. If the property exonerated is situated

within a county, or a city or town being a county of itself, then if the tax purchased amounts to 40*s. per annum* it must of course confer a right of voting for such county. If the property is situate within a town or borough where the franchise is in freeholders without reference to the value of the freehold, then the purchase of such tax to any amount must, it is conceived, give an equally unquestionable vote. But it seems to have been doubted whether some words in the 200dth sect. of the above statute, 42 *Geo.* 3. *c.* 116., and in the 51 *Geo.* 3. *c.* 99., have not thrown a doubt on the right to vote in boroughs in respect of this property, and may have not confined the right to the purchaser of land-tax in counties. An attentive perusal of the clauses will, however, clearly show that no such doubt can fairly arise upon them; and, indeed, the words of the latter statute are manifestly as applicable to a rent arising from land-tax purchased within a borough as within a county. The 42 *Geo.* 3. *c.* 116. *s.* 200. applies to votes in respect of the *property discharged* from land-tax; the 51 *Geo.* 3. *c.* 99. to votes in respect of the *land-tax purchased* itself. The object of the former enactment is to remove any doubt which might arise as to votes in respect of property so exonerated, owing to the want of the land-tax assessment required by former acts. After reciting "that doubts may arise by reason

of the provisions of an act passed in the 19 *Geo. 2.*, intituled, 'An act for better regulating of elections of members to serve in parliament for such cities and towns in England as are counties of themselves;' and of another act passed in the 20th year of the reign of His present Majesty, intituled, 'An act to remove certain difficulties relative to voters at county elections,' as to the right of voting for the election of knights of the shire, or other members of parliament, by persons who may claim so to vote in respect of messuages, lands, or tenements, the land-tax charged whereon may have been redeemed; it is enacted, that every person who shall tender his vote at the election of any knight of the shire *or other member* to serve in parliament, in respect of any messuages, lands, or tenements, of the quality and value which would by law entitle him to vote at such election, the land-tax charged whereon shall have been redeemed or purchased, shall be entitled to vote at any such election as aforesaid, without being compelled to show that such messuages, &c. have been assessed to the land-tax, upon proving to the satisfaction of the returning officer on oath or otherwise, that such land-tax hath at any time previously to such election been redeemed or purchased, and the said messuages, &c. become exonerated therefrom, under the provisions of the said recited acts for the redemption of land-

tax, or of this act, the said recited acts or any other act to the contrary notwithstanding." Now this enactment, applying entirely to votes in respect of property of which the land-tax has been redeemed or purchased, does not seem in any way to affect votes in respect of the purchased land-tax itself; for it is impossible to contend that any inference can be drawn from it that the legislature only intended redemptions and purchases of land-tax to take place in counties, and cities and towns being counties, since the words of the former parts of the statute clearly authorise the redemption and purchase of land-tax on *any* manors, messuages, lands, &c. wherever situate. The above clause is confined in its operation to cases of redeemed or purchased land-tax, in counties, and cities and towns being counties, since only such places are within the operation of the two recited acts respecting the land-tax assessment. It, therefore, of course, only removes the difficulty arising from the want of assessment, where such assessment was by the former statutes necessary to entitle a freeholder to vote; and it would have been nugatory to refer to the case of freeholders voting for boroughs who are not within the two recited acts, or any other act, as to land-tax assessment.

The statute 51 *Geo.* 3. *c.* 99. was passed to remove any doubts as to the necessity of registering

the fee-farm rents acquired by persons purchasing land-tax, in the same manner that annuities and rents are required to be registered by 3 *Geo.* 3. *c.* 24. It is intituled, " An act for removing doubts as to the registering of certain property purchased or sold under the Land-Tax Redemption-Act, in right of which persons may claim to vote *at elections of members to serve in parliament;*" words certainly including all elections, and not confined to elections for counties. After reciting the clause in 42 *Geo.* 3. *c.* 116., (above set out,) vesting a fee-farm rent in the purchaser of unredeemed land-tax, and that " no person is allowed to vote for electing *any* member of parliament in respect of any annuity, fee-farm rent, or rent-charge, without the same being first duly registered, and that doubts had arisen whether any person could vote at ' an election for a member of parliament' in respect of any land-tax so purchased as aforesaid, without the same, or some memorial of the contract, or certificate for such purchase, being first registered in the same manner as other fee-farm rents, &c.; for removing such doubts it is enacted and declared, that, in order to entitle any person to vote at an election for a member of parliament, in respect of land-tax so purchased, it shall not be necessary to have the same, or any memorial of the contract, or certificate of the purchase thereof, registered, as other fee-farm rents and annuities

are required to be registered, before any person can vote for electing a member of parliament in respect thereof."

From the language of this statute, certainly, it is not possible to infer that the legislature considered that the purchase of land-tax only conferred a vote in counties, and not in other places. The inference, indeed, seems directly the other way; for not only does the title of the act apply to elections generally, but, in four places in the body of the act, the same general words are used, referring to *any* election of members of parliament. No argument can be drawn, therefore, from either of these statutes against the right to vote for a borough where freeholders vote, in respect of purchased land-tax; and as the purchaser acquires a new freehold interest created by the statute, all the privileges annexed to a freehold in the local situation where it exists must attach to it, and, amongst others, that of electing members where the elective franchise is in freeholders.

CHAP. III.

OF DISQUALIFICATION ARISING FROM CIVIL OUTLAWRY AND EXCOMMUNICATION.

MR. SERJEANT HEYWOOD states, in his valuable book on County Elections, [2d edit. 334.] that he does not find any *determination* of the House of Commons upon the question, whether an outlaw is disqualified from voting, but mentions several instances from the Journals where votes have been *objected to* on this ground. [*Bridgewater*, 1692, 10 *Journ.* 738.—*Launceston*, 1723, 20 *Journ.* 299.—*Hindon*, 1728, 21 *Journ.* 132.] On reference to the Journals it is impossible to gather what the House decided on the particular objections in these cases. These objections were of outlawry in civil cases, and probably no question can exist, that outlawry in treason or felony operates to disqualify a voter. In these cases, as judgment of outlawry appearing on record by the Sheriff's return to the exigent is held to have the same effect as judgment after verdict or confession, [3 *Inst.* 212.; *Hawk. P. C. b.* 2. *c.* 48. *s.* 22.] the party stands precisely in the situation of a felon-convict, who has been determined, in several cases, to be disqualified from

voting. [*Sudbury Phillips.* 170. *Colchester*, 1 *Peck.* 509. And see *Milborne Port.* 1 *Doug.* 130.] Indeed, if no other reason existed, such persons being presumed in law unworthy of belief on oath, and therefore incompetent as witnesses, would not be competent to take the oaths required of electors. The question, therefore, can only arise as to outlaws in civil suits. And here the disqualification must, it would seem, rest either on the ground of personal incapacity, arising from the voter's being put out of the law, and being no longer *liber et legalis homo*, — or on the ground of the forfeiture of property incurred by the outlawry.

1st. With respect to the latter ground. By the mere outlawry the outlaw forfeits all his goods and chattels to the King, [*Bac. Ab. Outlawry*, 230. *5th edit.*] — and *after inquisition found*, but not before, the King becomes entitled to the rents and profits of his lands until the outlawry is reversed [*ibid.*], and the Crown either enters into the receipt of the rents, and leases the lands, or grants a *custodiam* of them to the party suing out the outlawry, who thereby becomes entitled to the rents and profits, the legal estate still remaining in the outlaw. With respect, therefore, to elections for counties, (both corporate and otherwise,) until inquisition found by the Sheriff's jury, there would appear to be no objection to the outlaw's vote, on the

ground of any operation of the outlawry on his freehold estate; but after inquisition found, it would seem difficult any longer to consider the outlaw as "having free land to the value of 40*s.* &c." within the meaning of the statute, since, although he retains the legal estate, he has lost the beneficial interest which it was the main object of the statute to require. And the same reasoning would apply to votes for boroughs, where the franchise is in freeholders. But in burgage tenures, where the right of voting is annexed to an estate in ancient burgage tenements, as it appears to be immaterial whether the tenement is of any value or not, (at Downton a pool of water gives the right of voting,) [*Heywood, Borough Elect.* 313.]; and as the estate still remains in the outlaw, notwithstanding the outlawry, it would seem that the outlawry cannot affect the vote on the ground of the rents and profits becoming vested in the Crown. Where, however, the burgage tenant has only a term of years in the tenement, the term itself would be forfeited as a chattel to the Crown immediately on the outlawry, and the qualification must in such case be destroyed.

With respect to cases of *personal* franchise (as freemen, &c. &c.), I am not aware that the outlawry would have any direct operation to defeat such a franchise. In the case of the *King* v. *the Mayor, &c. of Bristol*, [1 *Show.* 288. *Carth.* 199.]

the Court appear to have considered that an outlawry did not operate as a *forfeiture* of the corporate office of sword-bearer to the mayor. But they held, that when the outlawry appeared on the return to the mandamus obtained by the officer, it created a *disability*, and that as the Court could not take notice of the fact, that the outlawry had been reversed, the party must sue out a special writ, stating the outlawry and the reversal. I presume by the "disability" is meant a disability to come into court, and apply for a mandamus, particularly as the Court mention, as an analogous case, that "a parker outlawed cannot bring writs of assize." In the above case, it appears from the report in *Carthew*, that the outlawry was on an indictment for *treason*.

2d. Would the voter be disqualified on the ground of a personal incapacity arising from the outlawry?—It is to be observed, that the grievous personal penalties said in the old books [*Fleta, lib.* 1. *c.* 27. *Brac. lib.* 5. 421. *Mirror, c.* 4. *s.* 4. *Co. Lit.* 128. *b.*] to be incurred by outlawry, — as that the outlaw bore *caput lupinum*, and might be slain with impunity, &c. &c. which only existed antecedent to the time of *Edw.* 3., were confined to outlawry *for treason and felony*, and do not appear ever to have extended to outlawry in civil actions. A vague notion is, I apprehend, often entertained as to the

disabilities consequent on outlawry, from construing the technical expression, "put out of the law," as if it literally meant generally excluded from all legal rights and civil capacities. But as applied to outlawry in civil actions, I humbly submit that this expression has a much narrower signification, and intends little, if any thing, beyond the disability of having no *locus standi*, so as to be able to sue in a court of justice. Thus *Littleton* [sect. 197.] says, "Where a man is outlawed upon an action of debt or trespass, or any other action or indictment, the tenant or defendant may show all the matter of record and the outlawry, and demand judgment if he shall be amoved, because he is *out of the law to sue an action* during the time that he is outlawed." It is true he could not be an auditor in the old action of accompt to take accounts. [*Co. Lit.* 6. *b.*] But such persons were usually officers of the Court, and acted in some sort judicially; and there are obvious reasons why a party in contempt could not act as officer of the Court. So also it is stated, (though doubtfully,) in 2 *Hawk. P. C. c.* 24. *s.* 4. that an outlaw in a personal action could not be an approver, because "he was out of the law," and his accusation should not be of such credit as to put any person on trial. But an approver was obviously *an actor* in a court of justice, the proceeding being an appeal. It is clear that an outlaw in civil suits is a competent witness, and

that he may himself sue, *in auter droit*, as executor, &c. But Lord Coke states that he cannot be a juror, because he is not *liber et legalis homo* [*Co. Lit.* 6. *b.*]; it would appear, however, from the same passage, that the reason was one which has now ceased to apply — viz. that if the outlaw joined in the verdict, the party could not have an attaint. And in *Sir William Withipole*'s case, [*Cro. Car.* 134. 147. *Sir. W. Jones's Rep.* 198.] the twelve judges were divided in opinion, on the point whether an outlaw in a civil suit was a good juror on an inquest before the coroner, though the majority appear to have held in the negative. On a second indictment of Sir William, found before commissioners of oyer and terminer, [*Cro. Car.* 147.] it was objected, that one of the inquest was an outlaw in trespass; but because the counsel had not the record ready, the objection was overruled — the Court, however, said; "If the record had been produced, it would not have been material, *the outlawry not being for felony.*" An outlaw has capacity to be a farmer to the King, and may take a lease from him. [*Com. Dig. Utlagary, D.* 3.] Mr. Justice Blackstone, in speaking of civil outlawry, says, — "Such outlawry is putting a man out of the protection of the law, *so that* he is incapable to bring an action for redress of injuries, and it is also attended with a forfeiture of all one's goods and chattels to the

King:" — he mentions nothing of any further disabilities. From these cases, which are all that I have found in the books as to disabilities arising from civil outlawry, it would seem that these disabilities are almost all referable to the principle that an outlaw is excluded from appearing in a court to seek remedy, or to institute any legal proceeding. His incapacity as a juror is very questionable, and, if it exists, may fairly be put on the same ground as the disability to be an auditor in accompt. But these cases seem all to stand on a different footing from the exercise of the elective franchise — a civil right not falling within the forfeiture of outlawry, (unless in the cases before noticed,) and not requiring to effectuate its exercise any aid from process of a court of law. In the famous case of *Sir Francis Goodwin*, in 1604, [*Introduction to Glanville's Cases*, lxxiii.] the House of Commons held, that outlawry in a civil suit did not render a *candidate* ineligible; and many of the reasonings applicable to this case would apply equally to that of a voter. This was, however, antecedent to the act of 9 *Ann. c. 5.*, requiring freehold landed estate as a qualification in members; and as outlawry after inquisition found would affect the member's estate in the manner above stated, it would now appear on principle to defeat the landed qualification required by the statute.

The votes of persons excommunicated have frequently been objected to at elections, but the decisions of the House of Commons do not appear. [8 *Journ.* 118. 13 *Journ.* 42.] According to Bracton, *excommunicato interdicitur omnis actus legitimus ita quod agere non potest*, &c. &c.; and the testimony of such persons was formerly rejected in courts of law, and has been considered inadmissible by authors, on the ground of a *dictum* of Lord Coke. [2 *Bulstrode's Rep.* 155.] But all doubt would appear now to be removed as to their capacity to vote by the 53 *Geo.* 3. *c.* 127. *ss.* 2, 3. which enacts, that no sentence of excommunication shall be pronounced by ecclesiastical courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur *any civil penalty* or *disability whatsoever.*

CHAP. IV.

OF VOTES FOR FREEHOLD OFFICES TO WHICH NO LAND IS ANNEXED.

THE votes of a great variety of public officers have been commonly received at county elections, where the voters have made out that they have held their offices for life, or *quamdiu bene se gesserint.* The only questions generally made have been, whether they had a freehold *interest* and were duly assessed to the land-tax — and the qualification has been held sufficient, although the emoluments of the office have not in any degree been derived from *land.* No objection appears in the early Reports that the qualification was a mere *personal office;* but before the Middlesex Committee in 1804, [2 *Peckwell,* 89.] this subject was much discussed in the case of a great variety of votes for offices in the Courts of justice, with fees from suitors, as well as in cases of parish clerks, schoolmasters, sextons, organists, &c.; and the committee, after hearing much argument, rejected all such votes, in right of freehold offices, as were not founded on a freehold interest in house or land. Amongst others, a Six Clerk in the Court of Chancery, a Sixty Clerk in

that court, a Master in Chancery, Clerk of the Peace for Middlesex, Sub-register of the Court of Chancery, Clerk of the Petty Bag, King's Coroner and Attorney, Clerk in Court in the King's Bench, Clerk of the Treasury, and Secondary in the King's Bench, Cursitor, Filacer, Attorney of the Pipe, Usher of the Common Pleas and Exchequer, Sealer in the Court of Chancery, deputy Chirographer, prothonotary, clerk of the King's silver, King's remembrancer, clerk of the juries, high bailiff of Westminster, official of the archdeaconry, steward of the dean and chapter, register of fines, lay vicar, abbey-brewer and butler, bell-ringer, gardener, receiver, cook, organ-blower, chorister, almsman, abbey-sacrist to Westminster-abbey, and several organists, parish-clerks, and sextons.

The principal discussion took place on the vote of Mr. Ord, in right of his office of Master in Chancery, the profits of which arise wholly from salaries and fees from suitors, and the building, in which the business is conducted, is vested in the crown. It was admitted that the other votes fell within the same principle. In support of the vote it was contended, that the office being for life was a freehold, and that it was clearly a "tenement," and thus strictly within the letter and meaning of the statute 8 *Hen.* 6. *c.* 7., requiring electors to have "free land or tenement" within the county — that it was an office for

which an assize of novel disseisin would lie, an action strictly confined to real property. In *Fitzherbert's N. B.* 192. *E.* is a writ of novel disseisin for the office of sergeant in the abbey of Peterborough, which the demandant claimed to be his right and inheritance. In *Jehu Webb's* case, (8 *Coke's R.* 47. *a.*) it is said, "It appears from the books, that an assize lay of an office *ut de libero tenemento* at the common law, for wherever a *præcipe quod reddat* lay an assize lay; as for instance, for the bailiwick of keeping a park, for the beadlery of a hundred or of a soke, and "exception was taken, that this was a profit issuing out of no freehold, but it was *not allowed*,"—and an assize lay, although the disseisee had only an estate for life in the office, as the office of packing of cloths, of clerk of the Crown in Chancery, of beadle of the hundred of Westminster, of Filacer of the Common Pleas, and of Register of the Admiralty. [8 *Coke, R.* 47.] In *Lord Raymond's Rep.* 1. p. 158. is the case of an assize brought *de libero tenemento* for the office of clerk of the peace for the county of Kent. The office must, however, be a *public* office, and an office of *profit*, not merely of charge. The statutes concerning county elections contain nothing adverse to the vote, but are rather in favour of it. The stat. 12 *Ann. c.* 5. exempts from the necessity of assessment to the land-tax persons voting for rents, tithes, or *other incorporeal here-*

ditaments, not usually assessed. It is clear, the office is an incorporeal hereditament. The 18 *Geo. 2. c.* 18. *s.* 4. contains a similar exemption in favour of persons voting for seats belonging to offices; and in sect. 5. provides for the rights of persons who have become entitled to vote within 12 months by promotion to an office. In *Sone* v. *Ashton* [3 *Burr. Rep.* 1287.] the question was, whether the office of Marshal of the King's Bench was a sufficient qualification for a commissioner of the land-tax in Surrey, which qualification, by the 33 *Geo. 2.*, must arise out of *lands and tenements.* The freehold of the prison, and of the Marshal's house, &c., is vested in the crown. It was insisted that the office was not such a "*tenement*" as the statute required. Lord Mansfield; "Is not his office a tenement? and he has a qualified freehold in it. He is qualified both within the words and intention of the statute. Is not the Master of the Rolls qualified for the houses which belong to him in right of his office? [The question, however, is, whether an office *without* house or land qualifies?] I know that the master of St. Catherine's has sat in parliament, under the qualification of his office." Judgment was given for the defendant, the Marshal.

Against the vote of Mr. Ord it was contended, that land only conferred the right of voting — that the office in question was merely personal,

and not in any way connected with land, or any subject of a real nature — that the knights of the shire were understood to represent the landed interest of the county — that the electors were the members of the county court, and there was no trace of such officers as these ever having been summoned to or having attended as members of it. [1 *Heyw.* 44.] Neither was there any trace of their being called upon to contribute to the wages of knights, which had been thought by some to be a criterion by which those who formerly had a right to vote might be distinguished.* Lord Coke, in his Commentary on the statute of *West.* 2. 13 *Edw.* 1. *de donis*, fully explains the meaning of the word "*tenements.*" [*Co. Lit.* 20. *a.*] He says, "This is the only word which the said statute of *West.* 2., that createth estates tail, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, *though they lie not in tenure;* therefore all these, without question, may be entailed: as rents, estovers, commons, or other profits whatsoever, granted *out of land*, or uses, offices, dignities, *which concern lands or certain places*, may be entailed within the said

* See the observations on this point, *ante*, on the subject of the disqualification of paupers.

statute, because all these savour of the realty. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, *or some certain place*, such inheritances cannot be entailed, because they savour nothing of the realty." The office of Master in Chancery was merely personal, and not connected with any particular place, but might be exercised any where — that it did not follow because an assize might lie for such an office, that therefore it gave a qualification to vote for knights of the shire; since a packer of wool, a serjeant-at-arms, a tenant of a corody might, according to Lord Coke, bring an assize for their offices. But yet it could not be contended that they were ever members of the county court. The statute 18 *Geo.* 2. *c.* 18. *s.* 4. only exempted persons voting in *right of* "*messuages or seats*" belonging to their offices, which would rather lead to an inference that offices to which no messuages or seats were annexed did not give a vote; and it was plain a Master in Chancery had no right in respect of the place where his office was exercised, since the freehold was in the crown. The Committee held the vote *bad.* [See 2 *Peck.* 89. *et seq.*]

It is to be observed, that the counsel against the vote in citing Lord Coke's Commentary on the Statute *de donis* stopped precisely where Lord

Coke's language began to be unfavourable to his argument; for His Lordship, after the passage above cited, goes on: "But examples will illustrate and make this learning clear. The writ of assize was *de libero tenemento*, [7 *Ass.* p. 12, &c.] and made his plaint of the office of the fourth part of the serjeant of the common place, and the writ *adjudged good;* and seeing that a man hath *liberum tenementum* in it, by consequent, it may be entailed. The office of the *keeping of the church* of our Lady of Lincoln was entailed, and a formedon brought upon that gift of the office by the issue in tail, 18 *E.* 3. *c.* 27. The office of the *Marshal of England* entailed, 5 *Edw.* 4. *c.* 3. The office of one of the *Chamberlains of the Exchequer* entailed, 1 *H.* 7. *c.* 28. The office of a *forestership* entailed, 4 *H.* 7. *c.* 10." So that Lord Coke considered it clear, that all these offices were not merely personal, but were capable of being entailed within the meaning of the word "*tenementa*" in the statute *de donis;* and then His Lordship proceeds to give instances of what he considers *offices merely personal.* "But if I grant to a man and to the heirs of his body to be keeper of my hounds, or master of my horse, or to be my falconer, or such like, with a fee therefore, yet these cannot be entailed within the said statute, for that they be not issuing out of "tenements," or annexed thereto, or exercisable within, or concerning

lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realty." [*Co. Lit.* 20. *a.*]

Now, taking Lord Coke's passage altogether, it would certainly appear that his notion of personal offices was confined to employments *strictly personal, and in gross* — the instances mentioned are rather of a menial and domestic kind — and from his words "offices concerning land *or* some certain places," it is clear he considered that offices might be real in nature and entailable, though not concerning "land," if they concerned "*certain places.*" By these last words, what could His Lordship intend but offices fixed and annexed to public Courts and institutions of a local abode, in contradistinction to mere personal duties and employments, which the holder might fulfil wherever he pleased? And in this view of the passage it would seem that such offices as a Master in the Court of Chancery, and similar public functions in Courts of justice generally, would fall clearly within both Lord Coke's definition and his examples of offices capable of being entailed as "*tenements,*" and of being the subject of real writs. The question is, therefore, whether the words "free tenements" and "freehold," in the statutes 8 *Hen.* 6. *c.* 7. and 10 *Hen.* 7. *c.* 2., as to qualifications to elect, can be held to have any other meaning than similar words used in the statute *de donis,*

or interpreted according to the common law. If they cannot, then the decision of the Middlesex Committee would seem to be at variance with the principles and cases stated by Lord Coke. Is there, therefore, ground for inferring, that the freeholders meant by the qualification acts are not *all* freeholders, but only *such* as have a freehold estate in *lands?* — in short, freeholders in *tenure* as well as in *interest?* Undoubtedly the stat. 7 *Hen.* 4. *c.* 15., directing the manner of electing knights of the shire, ordained, that the election should be at the county court, and "that all they that be there present, as well suitors duly summoned for the same cause as other," should proceed to the election, &c. &c. And *Dalton*, in speaking of the construction of the stat. 8 *Hen.* 6., says, "Again it seemeth they must be such freeholders as do contribute to the wages of the knights of the shire, or else such as are suitors to the county court." [*Office of Sheriff*, p. 333.] And it is said that freeholders, in right of office, neither contributed to expences nor were suitors to the county court. But both these positions are stated without any authority cited; and, considering the doubt and obscurity attending the subject as to both points, no satisfactory argument can perhaps be founded on either. The suitors to the county court were indeed originally probably confined to freeholders *by tenure*, either

tenants *in capite* only, or both these and mesne tenants, [*Spelm. Rem.* 50.] — and this description would certainly exclude persons having a mere freehold interest in offices; but whether freeholders of the latter kind might not subsequently introduce themselves, and take part in the proceedings of the county court, and join in electing knights, coroners, and verderors, is a point involved in doubt. As to the contribution to wages, it is difficult to form any clear notion who were the classes *contributable*. Nothing can be inferred from the general terms of the writs *de expensis*, which in counties always run, "Præcipimus quod *de communitate* comitatus tui rationabiles expensas, &c. habere facias," &c. &c. [*Prynne's 4th Reg. passim*; and see *Hallam*, iii. 170, 171.] And even supposing that freeholders in right of office might not originally elect, by reason of not being suitors to the county court, it might still be a question whether the statutes 8 *H.* 6. *c.* 7. and 10 *H.* 6. *c.* 2., which speak of "freeholds" and "free tenements," might not, by the generality of these words, confer the qualification on all possessed of *any* freehold of the requisite value. Previous to the Middlesex case there was no decision against votes for freehold offices, and only one instance of the objection being taken. [*Cambridgeshire*, 1693, 11 *Journ.* 93. 2 *Peckwell*, 100. *notâ.*] The 28 *Geo.* 3. *c.* 36. *s.* 6. required a declaration that

the estate for which the voter came to vote "consists of (specifying whether the same "consists of lands or messuages, or of tithes, *or* "*of an office*, or of a rent-charge);" and "if the "said estate consist *of an office*, then naming the "same;" and the schedule, No. 1., ran thus— "Freehold estate, that is, whether it be lands, or "messuages, or tithes, or *office* of (naming "such *office*)" — which seems to show that the legislature considered an "office," independently of land, as conferring a qualification. The statute is now repealed. The votes of parish clerks, schoolmasters, sextons, &c. rest on the same footing as those in right of other offices— and, according to the decision of the Middlesex committee, such persons are not qualified unless they hold their offices for life, and also receive 40*s. per annum* from *land* in respect of them. Mr. Serjeant Heywood states, [*p.* 67. *Heywood. C. 2d edit.*] that the rule of this Committee has been approved of, and adopted generally at county elections which have since taken place. However, as it certainly goes to disqualify a large class of persons, whose right of voting had been considered established by long and uniform practice, and as its principle is at least open to argument, perhaps the case may not be held to have finally settled the question.

CHAP. V.

DISQUALIFICATION OF VOTERS ARISING FROM CONVICTION OF BRIBERY.

Among other questions put by Lord Glenbervie [*2 Doug. R.* 417.] on the disqualification arising from bribery, is this: "If an elector is proved to have acted as an agent in bribing other electors, but there is no proof that he himself was bribed, is his vote a good vote or void?" [*2 Doug.* 417. *note B.*] and he adds, "Those who argue that it is void say that the acting as an agent in bribing others is such an infringement of the freedom of election, that the law will presume that such agent was as little scrupulous with regard to himself as he had been with regard to others."

This reasoning is not very satisfactory; and the terms of the statute against bribery seem to decide that in the case supposed the vote would be free from objection. The 7th section of the *2 Geo. 2. c. 24.*, after enacting that if any person by gift or reward, or promise, agreement, or security for gift or reward, shall corrupt or

procure any person to give his vote, &c., he shall forfeit 500*l.*, &c., proceeds thus — "And every person offending in any of the cases aforesaid, *from and after judgment obtained against him* in any action of debt, &c., or being *otherwise lawfully convicted* thereof, shall for ever be disabled to vote in any election of any member to parliament." The disability of voting, therefore, arising from the offence of corruptly obtaining votes under this statute, is expressly only to accrue on judgment or conviction against the party — and, therefore, the vote of the offender could not be affected under the statute by the simple fact committed, until prosecuted to judgment or conviction. And even supposing the same disabilities to accrue from a prosecution at common law, as from a proceeding under the statute — which Lord Glenbervie thinks would be the case by reason of the words in the statute, "or being otherwise lawfully convicted thereof" [4 *Doug.* 294.] — still the disability accruing only under the words of the statute could only attach on judgment or conviction. To say, that because a party has committed the offence of bribing others it is to be presumed that he has committed the additional offence of taking a bribe himself, seems much too lax a mode of arriving at an inference which is to subject a party to a penal disability. The bribes given by the agent to other voters would of course destroy

those votes; but they could not affect the agent's personal vote, except through the medium of the statutory disability, which can only attach upon him strictly according to the language of the act. Indeed, this point seems to have been in effect decided by a case going much beyond it—[*Second Ilchester, 2 Peckwell, 245.*] where votes were objected to at the second election, on the ground that the voters had been declared, by a resolution of a committee, guilty of bribery at the former election, and were thereby disqualified to vote. The Committee determined, after much argument, that to create a disability in the voter, even the previous resolution of a Committee declaring his guilt was insufficient; since the resolution could not amount to a *lawful conviction* within the terms of the statute—and the Committee intimated, that if the fact of bribery had been proved before them by *original evidence*, their opinion would have been the same. Those who desire to disqualify voters for bribery must, therefore, pursue the means pointed out by the statute, by prosecuting to conviction within two years after the offence.

In the case of *The King* v. *Pitt*, [3 *Burr. Rep.* 1335.] the Court of King's Bench held, that bribery still remained an offence at common law, and might be prosecuted by information or indictment, the legislature by the statute having only *added* the penal action; and the information

in that case having been granted, and the party convicted within the two years allowed for proceedings under the statute, the Court held that they could only inflict an *additional* punishment on the defendant, taking into consideration that he was still liable to the penalties and disabilities imposed by the statute, in case he should be proceeded against upon it — and they expressed great doubts as to the propriety of granting informations until the statute period of two years had elapsed. And in the *King* v. *Haydon*, [3 *Burr.* 1387.] the Court delayed pronouncing judgment on the defendant till the time for bringing an action on the statute had elapsed. Lord Mansfield would appear from his language in the former case to have been of opinion with Lord Glenbervie, that a conviction at common law would subject the party to all the disabilities of a conviction on the statute, by reason of the words "or otherwise lawfully convicted." But it would seem that, in order to have this effect, the proceeding at common law, whether by information or indictment, must be commenced within two years after the offence, since the 11th section of the statute provides generally, "that no person shall be made liable to any incapacity, disability, forfeiture, or penalty, by this act laid or imposed, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, &c. shall be incurred, &c." [In strictness this

should be *after such act or such offence committed,* and in the 9 *Geo. 2. c.* 38., explaining and confirming this statute, the words are so.] And although the prosecution should be at common law, still the disability is *laid and imposed* by the statute, and therefore would not arise unless the prosecution commenced within the period appointed.

CHAP. VI.

OF PROCURING THE RETURN OF MEMBERS, OR INDIVIDUAL VOTES, IN CONSIDERATION OF A BRIBE.

Lord Glenbervie puts another case: "If an elector receive a bribe, in order both to vote himself and to procure the votes of others, and he from that corrupt motive do procure the votes of others, but without corrupting them, and merely by persuasion or a justifiable influence which he may have over them, shall the votes so procured be considered as good or void?" [2 *Doug.* 417.] This question does not appear to have arisen before a committee of elections, though, considering the frequency of corrupt bargains between candidates and local agents and persons exercising influence over voters in boroughs, it is not unlikely to arise. Corrupt agents do, indeed, for the most part, proceed by corrupting voters; but still instances do occasionally occur, where the agent alone absorbs the candidate's money, and the voters are brought to the poll by the mere influence of diligent canvassing—and these are the cases to which Lord Glenbervie's question applies. Lord Glenbervie states

the question to have been the chief point in a case of *Paterson* v. *Alexander*, arising on an annual election of magistrates for Stirling, in Scotland, in 1773, in which case the Court of Session by a majority of one decided such votes to be bad. An appeal was brought to the House of Lords, the determination of which does not appear. The voters procured in the case supposed would certainly be free from the taint of bribery, and clearly not within the words or spirit of the statutes against that offence. Their votes would be given *freely*, since persuasion and the exercise of influence, if not of a *corrupt* kind, cannot be considered to interfere with freedom of choice; and when individuals, *sui juris*, have given their suffrages according to the free determination of their own minds, unswayed by corrupt motives, it may be said to be a strong, and, perhaps, inequitable measure to disfranchise them *pro hac vice*, by annulling their votes, because they may have been to a certain extent influenced by the solicitations of individuals acting for a corrupt reward. On the other hand, it may be said that the votes must be considered as obtained by a fraud on the voters; since, had they known of the corrupt bargain between the candidate and the canvassing agent, it is reasonable to suppose they would have rejected the agent's solicitations and refused their votes; to which it may be replied, that the principle of

caveat contractor applies, and that persons of competent understanding, after suffering themselves to be over-persuaded, cannot complain of being duped, because the person soliciting them was influenced by corrupt interest in his solicitations. Against the votes it might also be urged, that the public object of suppressing bribery would be materially aided by considering them invalid, since nothing could tend more to discourage such illegal bargains than not merely to subject the parties affected with the corrupt conduct to penalties and disabilities, but also at once to annihilate the advantage of such schemes, by destroying the votes obtained by a corrupt agent, although the voters themselves might be unaffected with corruption. The reasons in favour of the votes seem, however, to preponderate.

Persons procuring or endeavouring to procure the return of members are now, by the 49 *G.* 3. *c.* 118., (Mr. Curwen's act,) subject to penalties to which they were not previously liable, since the former acts only applied to cases where parties "having votes, or claiming to have them," were corrupted to give them for money or reward, and not to cases where the patron of a borough or an electioneering agent receives money for procuring a return by his influence over others. This statute (sect. 1.) enacts, that any person giving directly or indirectly, or promising or agreeing to give any sum of money,

gift, or reward, to any person, upon any engagement, contract, or agreement, that such person shall, by himself, or others at his solicitation, procure, or endeavour to procure, the return of any person to serve in parliament, shall, *if not returned* to parliament, for every such gift or promise, forfeit the sum of 1000*l.*; and, *if returned*, and so having given or promised to give, or knowing or consenting to such gifts, shall be disabled to serve *in that parliament* for such place; and any person receiving by himself, or by any person in trust for him, or to his use, or on his behalf, any such sum or gift, shall forfeit the value thereof, and also 500*l.*; which 500*l.*, and also the said sum of 1000*l.*, may be sued for by a common informer — and by sect. 3. the same provision, both as to pecuniary forfeiture and to the disability of sitting in parliament, is extended to persons giving, or promising, or accepting any offices, places, or employments on any such contract or agreement as is mentioned in the former section. As the legislature has thus taken measures for repressing, by severe penalties, the offence of procuring the return of members for corrupt benefit to the procurer, there would be the less reason on the ground of policy for considering votes so procured as void, where they were not obtained by bribery of the voters themselves; and certainly it is desirable that bribery should be repressed rather by severe inflictions on the guilty persons

than by a partial disfranchisement of those who may occasionally be made its blind and innocent instruments.

But on the construction of this statute it would seem that a question may arise, how far it would apply to a person in the situation of the corrupt elector, in the case put by Lord Glenbervie; viz. a person *having a vote himself* and receiving a bribe for his own vote, and also to procure the votes of others, or, in the words of the statute, "to procure or endeavour to procure the return," &c. &c., which words must, I apprehend, extend to procuring individual votes. The statute is obviously levelled at an offence not provided for by the former acts; viz. that of persons not voting themselves agreeing for corrupt reward to procure, or endeavour to procure, the return of members; and the preamble recites, that the giving or promising to give money, gift, or reward, in order to procure a return, &c., "if not given to or for the use of some person having or claiming to have a right to act as returning officer, or to vote at such election, is not bribery," within the meaning of *2 Geo. 2. c. 24.*, but *such* gifts or promises, (that is, gifts or promises to persons *not having a vote,*) are contrary to the ancient usage, right, and freedom of elections, &c.; and then it proceeds to enact generally, "that if any person or persons shall give or promise any

money, gift, or reward to *any person or persons* upon any engagement, contract, &c." [See p. 59.] The words, therefore, of the enacting clause are large enough to include *all* persons whatever, whether they have a right to vote or not, unless they are restrained by the words of the preamble; and there would seem no doubt that the spirit of the act would extend to all persons, and that it could hardly be intended that a patron of a borough, or an electioneering agent, receiving money for procuring the return of a member, should be excluded from its penal operation because he happened also to have a vote for the borough himself. On the other hand, it may be said, that the statute being highly penal requires a strict construction; and that the preamble shows that the legislature intended the new act to apply only to cases of corrupt procuring a return by *persons not voters*, leaving other cases, where the person to whom money is paid for procuring is a voter, to the provisions of the former acts — and the act creates no incapacity of voting for the place in the *receiver* of the money, gift, &c., which, it may be urged, it probably would have done, had it been intended to apply to persons having a right to vote, in the same manner as is provided by the 2 *Geo.* 2. *c.* 24. *s.* 7. This question becomes material, since the penalties of the 49 *Geo.* 3. *c.* 118. differ from, and are much more

severe than those of the former acts; and it frequently happens, in point of fact, that persons corruptly bargaining to procure returns of candidates are themselves in possession of a vote. The *2 Geo. 2. c. 24.* imposes on the giver or receiver of the money, or corrupt reward, a penalty of *500l.*, and incapacitates from voting. The Treating act, 7 & 8 *Will. 3. c. 4. s. 2.*, simply *disables the candidate* giving or promising money, gift, reward, entertainment, &c. to voters from serving in parliament for the particular place *at such election*, which is construed to extend to any vacancy occasioned by his treating or bribery. And the offence under the latter act can only be committed after the teste of the writ, or after a vacancy occurring in the course of a parliament and before the election.

But the *49 Geo. 3. c. 118.*, in addition to the disability of sitting as member, (which is more extensive than in the former act, since it incapacitates from sitting for the place "*in that parliament*,") imposes the penalty of *1000l.* on the *candidate* giving or promising, &c. recoverable by a common informer — and no time is limited for the commission of the offence.

CHAP. VII.

OF BRIBERY AS AFFECTING MEMBERS AND CANDIDATES, AND AVOIDING ELECTIONS.

MUCH doubt and discussion have arisen on the effect of treating and bribery at elections in avoiding the election, and in creating an incapacity in the members returned or candidates to sit for the particular place. I do not intend here to touch the question what amounts to bribery or treating, but only to enquire into the extent of its effect in avoiding elections and disabling members. It being a general principle of the common law confirmed by a legislative declaration in the statute of West. 1. and by the express language of the Bill of Rights, 1 *Will. & M. sess. 2. c. 2.*, that elections of members of parliament ought to be free, bribery at elections is determined by the Courts to be an offence punishable at common law, independent of the statutory provisions on the subject. Several cases also occurred antecedent to the statutes, where elections were avoided by the House of Commons on this ground, particularly the well known case of Thomas Longe returned burgess for Westbury in 1571, for the sum of

4*l.* paid to the mayor, [4*th Inst.* 1 *Journ. pa.* 88.] and the case of Stockbridge 1689, [10 *Journ.* 287. *Bewdley*, 1676. 9 *Journ.* 397.] where elections were avoided for bribery and corrupt practices. The bribery act of 2 *Geo.* 2. imposes the pecuniary penalty of 500*l.* on the giver or receiver of the bribe, and incapacitates the *voter*, after judgment against him in a penal action or other conviction of bribery, from ever voting in any election of a member of parliament. But it imposes no disability or incapacity on the member corrupting voters, and consequently in no way affects the seat. The only statutes which incapacitate the candidate from sitting are the Treating act, 7 *Will.* 3. *c.* 4. and the 49 *Geo.* 3. *c.* 118. The treating act passed in 1696 was obviously moulded on a resolution of the House of Commons, passed in 1677, and made a standing order of the House, 21st October, 1678, by which it was resolved; "That if any person there-"after to be elected to sit in the House of Com-"mons for any county, town, &c. *after* the teste, "or the issuing out of the writ or writs, upon "the calling or summoning of any parliament "or after any such place becomes vacant in the "time of parliament, shall by himself, or by any "others in his behalf, or at his charge, *at any* "*time before* the day of his election, give any "person or persons having vote in any such "election any meat or drink, exceeding the value

" of ten pounds, in any place but in his own " dwelling-house, or shall, before such election " be made and declared, make any other pre- " sent, gift, or reward, or promise, obligation, " or engagement to do the same, either to such " person or persons in particular, or to any " such county, city, &c. in general, or to or " for the use or benefit of them or any of them, " every such entertainment, present, gift, re- " ward, promise, obligation or engagement is " by this House *declared to be bribery*, and such " entertainment, present, gift, reward, promise, " obligation, or engagement being duly proved, " is and shall be sufficient ground, cause, and " matter to *make every such election void* as to the " person so offending, and to render the *person* " *so elected incapable to sit in parliament by such* " *election.*" The statute 7 *Will.* 3. *c.* 4. framed on the model of this Resolution, enacts and *declares*, sect. 1., " That no person or persons to be elected " to serve in parliament for any county, city, &c. " *after* the teste of the writ or summons, *or after* " the teste or the issuing out or ordering of the " writ or writs of election, upon the calling or " summoning of any parliament, *or after* any " such place shall become vacant in the time " of parliament, shall by himself, or by any " other ways or means on his or their behalf, or " at his or their charge, *before his or their elec-* " *tion* to serve in parliament for any county,

" city, town, or borough, port, or place within " (as above) directly or indirectly give, present, " or allow to any person or persons, having " voice or vote in such election, any money, " meat, drink, entertainment, or provision, or " make any present, gift, reward, or entertain- " ment, or shall at any time hereafter make " any promise, agreement, obligation, or en- " gagement to give or allow any money, meat, " drink, provision, present, reward, or entertain- " ment to or for any such person or persons in " particular, or to any such county, city, town, " borough, port, or place in general, or to or for " the use, advantage, benefit, employment, pro- " fit, or preferment of any such person or per- " sons, place or places, *in order to be elected,* " or for being elected, to serve in parliament " for such county, city, borough, town, port, " or place."

And sect. 2. enacts and *declares,* " That every " person so giving, presenting, or allowing, mak- " ing, promising, or engaging, doing, acting, " or proceeding, shall be and are hereby *de-* " *clared* and enacted, disabled and incapacitated " upon such election to serve in parliament for " such county, city, &c.; and that such person " shall be deemed and taken, and are hereby " *declared* and enacted to be deemed and taken, " no members in parliament, and shall not act, " sit, or have any vote or place in parliament,

" but shall be, and are *declared* and enacted " to be, to all intents, constructions, and pur- " poses, as if they had been never returned or " elected members for the parliament."

From the language of the Resolution, and also of the 7 *Will.* 3. *c.* 4., it will be seen that the offence of treating created by them is limited as to time, and can only be committed " *after* the teste of the writ of summons to parliament, or *after* the teste, or issuing out or ordering of the writ or writs of election upon the calling or summoning of any parliament, or after a vacancy in the course of a parliament," and " *before* the election;" though there can be no doubt that bribery by treating before the teste or vacancy is an offence punishable at common law; and other instances might also be mentioned of acts amounting to bribery at common law, which would not fall within the statute: and the question naturally occurs, how far offences constituting bribery at common law would be attended with the same avoidance of the election, and incapacities and disabilities to members, which attend the offence under the statute.

Lord Glenbervie, therefore, puts the question as doubtful: " Is a candidate who, *before* the teste or issuing of the writ, or *before* the vacancy, has bribed one or more electors, but who has a majority of unbribed votes, and has been returned, capable of sitting on such return?"

If he is not, it must be on the ground that bribery at common law incapacitates the member as it does by the statute. Lord Glenbervie expresses his own opinion in the affirmative, though he says, "The current of determinations "is said to be otherwise; and in the case of "St. Ives, (which he was then reporting,) it "was understood by the counsel on both sides, "that Mr. Praed must have been declared duly "elected if the Committee had not thought "that a person who has gained *any* votes by "bribery is incapable of sitting on that elec- "tion, although he have the voices of a ma- "jority of uncorrupted electors." That bribery or treating to any extent, however small, if it falls within the statute of *William* 3. avoids the election, follows as a necessary consequence from the provision of the statute incapacitating the member from sitting on such election; but the question is, when the acts are such as not to come within the statute, —as, for instance, the giving money-tickets to the voters on a canvass two years before the election, [*Berwick Case*, 1 *Peck.* 402.] or the distributing money two years before the election, [*Ilchester Case*, 1 *Luders*, 425.]—whether an avoidance of the election arises from them at common law, where the bribing candidate has the majority of fair votes, and where, consequently, the return has not been *caused* by bribery. In

other words, does the common law avoid the election if *any* bribery has been committed by the member, or only if *such* bribery has been committed as to procure his return by means of it?

It is impossible accurately to collect from the cases antecedent to the Statute on which of these principles the decisions proceeded. In Longe's case it would appear, from the entry in the Journals, that he was seated by *means* of his bribery: the words are, that he confessed that "he gave 4*l. for* that room and place of burgesship." [2 *Doug.* 402.] In the Bewdley case Sir Thomas Meres reports, from the Committee of Privileges and Elections, that the chief matter on which they grounded their opinion was the bribing of Mr. Foley *to procure the voices of electors;* and they then resolved that Mr. F. was not duly elected, — and that Mr. Herbert, the other candidate, was duly elected, but which had the majority of unbribed votes does not appear. [9 *Journ.* 397.] In the Stockbridge case the state of the poll does not appear; bribery was brought home to both the sitting member and the petitioner, and the House agreed with the resolutions of the Committee, that neither the sitting member nor the petitioner were duly elected, and that the election was void; and then a separate resolution was passed, "That W. Montague, Esq. (the sitting member) be disabled from

being elected a burgess to sit in the present Parliament for Stockbridge," and a similar resolution proposed as to the petitioner was negatived. [10 *Journ.* 287. 1689.] In this case it is evident that the sitting member's return was actually *brought about* by bribery. In the Chippenham case in 1691, [10 *Journ.* 638.] (also before the statute,) the Committee not only avoided the election on the ground of bribery, but actually seated the petitioning member, although the sitting member had a majority of unbribed votes. But the contrary doctrine, (which certainly has reason and justice on its side,) is now considered as established, viz. that the petitioning candidate in order to entitle himself to the seat, must disqualify so many of the sitting member's votes, by bribery, as to leave himself a majority, [*2 Doug.* 414.] This case, by deciding too much, seems therefore to destroy itself, as an authority even for avoiding the election at common law for bribery not producing the return. The opinion laid down, however, by modern text-writers, and which Lord Glenbervie admits, though he questions its propriety, is, that "bribery if detected by a Committee, and brought home upon the candidate, or his agent, though in *one* instance only, and though a majority of unbribed votes remain, will avoid the election." [*Simeon*, 197. *Male on Elect.* 345.] In the numerous modern

reports of cases since the statute, where Committees have passed resolutions avoiding elections for bribery, it is impossible to ascertain distinctly whether the offences on which the resolutions were grounded came within the statute of *William* or not. In many cases this cannot be at all ascertained, and in others, bribery and treating appear to be committed, both before and after the teste, &c.; so that the resolution does not necessarily rest on acts *without* the operation of the statute,—and I am not aware of any modern case of resolutions avoiding an election, in which it clearly appears from the report, that the acts of bribery or treating all occurred before the time fixed by the statute, or were on any other ground not included in its terms. There are, indeed, many decisions where the resolutions declare elections void for "bribery and corruption," or "bribery and corrupt practices," without mentioning "treating," or referring to the statute of *Will.* 3. [*Hindon*, 1 *Doug.* 176. *Kircudbright*, 1 *Luders*, 72. *Honiton*, 3 *Luders*, 162.] And in some of these cases, the question has been as to the disability of the member to stand at a second election by reason of such resolution on the first, and he has been held incapacitated; and it would seem probable that in some at least of these cases the resolution of the Committee has been founded on offences not within the statute of *William*, but either falling within the 2 *Geo.* 2.

or considered as bribery at common law; since where the offence has consisted in bribery or treating, within the 7 & 8 *Will.* 3., the resolution is generally so expressed. [*As in the first case of Southwark, Clifford*, 81.—*Berwick*, 1 *Peck.* 405.—*New Windsor*, 2 *Peck.* 194.]

The same question, whether incapacity arose from bribery at common law was raised in argument in the case of Boston, [1 *Peck.* 488.] though no decision of the Committee can be collected upon it. The petition was founded on alleged bribery and corruption by the sitting member; and, besides proof of bribes given by him to actual voters, the petitioners offered evidence of bribes given to persons claiming to have votes, but not in fact entitled to them. For the sitting member it was contended, that this evidence was immaterial, since it did not prove the offence created by the statute of *Will.* 3., viz. giving money to "persons *having* voice or vote in the election;" and that although the bribery act of 2 *Geo.* 2. contained the words "having, *or claiming* to have, a right to vote." yet the petitioners were bound to show an offence committed against the statute of *William*, since that *alone* created an incapacity in the member. To this it was answered, that "the acts against bribery were *in pari materiâ*; that bribery vacated the seat by the common law of parliament, and before the resolution of the House of Commons, 1677, as appeared by Longe's

case (before mentioned)." The Committee decided that the election was void; but as there was evidence of bribery of persons having votes, as well as of those having no right to vote, the decision may have proceeded on the ground of the former acts, which are a clear offence within the statute. The question was also discussed in the second Norwich case, [3 *Luders*, 455.] where Mr. Hobart was petitioned against as ineligible on the second election, on the ground of a resolution of a Committee on the first, resolving generally, that he was not duly elected, and that the election was void. The petitioner proved before the second Committee the petition and evidence before the first, to show that the grounds of the general resolution of the former Committee were acts of treating and bribery by Mr. Hobart at the first election, and that consequently he was disabled from sitting. The evidence made out acts of treating subsequent to the vacancy, as well as antecedent to it; and therefore the petitioner was not driven to rest his case entirely on the common law; and the only real question was as to the effect of the resolution of the first Committee in creating an incapacity to sit for the place, the sitting member's counsel contending that neither at common law nor under the statute did the bribery at the first election have any farther effect than to avoid *that* election; and the petitioner's counsel con-

tending, that, on the authority of the Stockbridge case, as well as the cases of Thetford, Chippenham, &c. since the statute, bribery, whether at common law or under the statute, created an incapacity to sit on a *future* election for the place. The Committee resolved Mr. Hobart to be duly elected; and the ground of this resolution, as explained by others, was, that although the resolution of the first Committee had proceeded on the ground of Mr. Hobart's treating, still that they conceived the disability of the statute of *William* not to be prospective to any future election. This decision, therefore, in no way affects the question of the effect of bribery *at common law* in avoiding an election — and the authority of the case is now, indeed, clearly overruled by the subsequent case of Southwark [*Cliff.* 130.] as to the incapacity created by the statute.

It is to be observed, that the question in its practical operation is now drawn within narrower limits by the statute 49 *Geo.* 3. *c.* 118. (noticed in a previous place), which imposes severe penalties on the offence of bribing persons *not having votes*, in order to procure the return of a member, which, though no doubt an offence at common law, was not included in the former acts. The bribery of the non-voters, which occasioned discussion in the above-mentioned case of *Boston*, [1 *Peck.* 438.] would, therefore, now fall within

this recent act, which expressly creates an incapacity in the offending member to sit for the place in *that parliament*. And probably the case of bribes given before the teste of the writ, which is put by Lord Glenbervie, is now almost the only supposable case not included within the terms of one of the statutes, and in which the question therefore can arise, how far bribery at common law, however small the degree, avoids the election, and creates an incapacity to sit. It must be distinctly borne in mind, that the only doubt is in those cases where the bribing member has the *majority of fair votes*. In cases where he is returned by a majority of bribed votes, no question can arise, since here, in order to exclude him it is not necessary to resort to any disability arising from his offence, — but his corrupt votes being struck off, he is left with a minority, and the election in such case is not avoided, but the petitioning member is seated as having the majority on the legal state of the poll. The question therefore is, — whether a candidate returned by *fair and legal votes* can be deprived of his seat, and the election declared void, because he has given bribes to other voters, whose votes are not necessary for his return. That this is the case under the statute of *William* is now beyond doubt. The language of the statute is large enough to apply to *any* corrupting of votes by the member, whether the occasion of the return

or not; and such is the construction put on it — nay more, it is held to apply to a case where no return at all takes place of the bribing candidate; for though the words are "no person hereafter *to be elected* to serve in Parliament shall give, &c. in order to be elected, or for being elected," it is decided that the statute applies to an *unsuccessful candidate* [*New Windsor, 2 Peck.* 193.]; and bribery may be proved by the sitting member against such candidate in order to affect him with an incapacity to sit, should he have the majority of fair votes [*ibid.*]—and even where he lays no claim to the seat, but only seeks to avoid the election, it may be proved against him in order to ground a resolution of the Committee, and thus to incapacitate him from standing as a candidate to supply the vacancy for the place. [*Coventry, 1 Peck.* 99. —*New Windsor, 2 Peck.* 198.] — But these cases only show the latitude of construction put upon the *statute* by Committees, and do not decide any thing as to the effect of bribery *not within* the statute. The object of the common law is, no doubt, to prevent returns of members by corrupt means; and this end would appear to be answered by only avoiding elections where the *return is so procured*, — and by carrying the principle farther, and avoiding any election where a single vote may have been bribed, the means appear to surpass the end, and *fair* elections are set aside, and the voices of

honest voters annulled, when the real object is only to avoid elections which are *corrupt*, and to defeat votes tainted by *illegal* bargains. A regard, therefore, to the rights of upright electors would seem to require that in all cases the majority of such voters should decide the election, unless, indeed, where they elect a person under a notorious legal disqualification, arising from office, or from conviction of bribery before a Committee or a court of law, made known at the election.

On the other hand, it may be contended that the statute of *William*, being by express and repeated words only *declaratory* of the common law, and being moulded almost in terms upon a previous resolution of the House of Commons, shows that bribery at common law was considered as avoiding the election and creating a disability in the member *in all cases* in which he appeared to have been guilty of it; — and it is remarkable, that not merely the main prohibitory clause of the statute of *William* is enacted and "*declared*," but the same language is used in the subsequent clause, as to the disability and incapacity of the member. And as a series of cases since the statute have avoided elections on the simple proof of acts of treating and bribery by the returned member, without any reference to the state of the poll, (the state of the poll being only gone into in general

when the petitioner claims the seat,) the statute is thus settled by an established construction to incapacitate for any offence within it, however uninfluential on the return; and this being so, perhaps it would now be difficult to draw a distinction between the offence under this *declaratory* act, and the offence at the common law. The general policy of the common law, of suppressing bribery by all means in its power, is also powerfully aided by disabling the delinquent member and avoiding his return, although his election may have been occasioned by the votes of legal voters. And it may be said that where the member is proved to have used bribery in some instances, it is not unreasonable to presume that other corrupt instances exist, though not capable of legal proof; and by holding this rigid rule, electors become interested in making a circumspect choice; seeing that if a single act of corruption is proved upon their candidate, their honest votes, though in a majority, will be for the time thrown away, and will not have the effect of enabling him to keep his seat.

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2. With respect to the *extent* of the incapacity incurred by the bribing member under the statute of *William*,— Lord Glenbervie observes, [*2 Doug.* 405.] that the most obvious meaning of the words is, that it shall only extend to the

election at which the bribery is committed; and in the case of "Second Norwich" [3 *Luders*, 445.] the Committee came to an express resolution to that effect. But the contrary doctrine would appear to be now settled; and it seems to be established, that a member declared guilty of treating or bribery by a Committee is incapacitated from sitting at *any* subsequent election, to fill up the vacancy occasioned by the avoidance of the first corrupt election. [*Hindon*, 1777, 3 *Luders*, 484. *Clifford*, 184. — *Kircudbright*, 1782, 1 *Luders*, 72. — *Honiton*, 1782, 3 *Luders*, 165. — *Southwark*, 1796, *Clifford*, 132. — *Canterbury*, 1797, *ibid.* 357. — See Mr. Tierney's review of the cases on this subject, in his able argument on his petition in the second Southwark Case, *Clifford*, 132.] In one case, indeed, [*Thetford*, 1699, 13 *Journ. p.* 145.] the member was declared incapable of sitting for the borough in *that parliament* — and the incapacity inflicted by the late act, 49 *Geo.* 3. *c.* 118., on members paying money, &c. to persons not having votes, in order to procure their return, expressly goes to that extent.

If the resolution in terms declares the member guilty of the corrupt practices, his ineligibility appears on the face of it, and no other evidence is of course necessary before the second Committee. [*2d Southwark*, *Clifford*, 221.] But if the resolution, in general terms, merely avoid the election,

it will then be for the petitioner to establish, by the Petition and the minutes of evidence of the former Committee, that the resolution proceeded on the ground of corrupt conduct by the sitting member. [*Kircudbright — Hindon — Honiton, ubi supra.*] In the Kircudbright case original evidence of the bribery is also said [3 *Luders*, 485.] to have been admitted before the second Committee; but in that case the resolution of the first Committee was not reported to the House. And in the Honiton case, where the Petition on the first election contained *no other charges* than bribery the Committee refused to hear original evidence. In the second Norwich case [*ubi sup.*] the counsel said the minutes of the former Committee were not offered as proof of the facts, but only to show the ground on which the former Committee came to their determination. But Mr. Tierney, in the second Southwark case, [*Clifford*, 197.] has well observed on their inconclusiveness for this purpose.

If the petitioner seek not merely to avoid the election on the ground of the sitting member's bribery, but also to obtain the seat himself, he must prove that due notice was given to the electors at the poll of the sitting member's ineligibility, by reason of the resolution of the first Committee. [*Second Southwark, Clifford*, 132.] The effect of this notice will be, that the votes given by the electors to the candidates so

disqualified are thrown away. But the incapacity of the member does not arise till the bribery is established by a resolution of a Committee, or judgment of a court of law. And, therefore, although notice may be given by one candidate to the electors of notorious bribery at the *same* election committed by the other candidate, still this will not operate to disqualify him, so that the votes given for him will be thrown away, and the other candidate seated with the minority of votes. The bribery in such case, when proved before a Committee, will only avoid the election. [*Penryn—Corbett & Dan.* 55.] The general principle as to votes being lost by the disability of the candidate for whom they are given is, — that if the disability arise from an *offence* of any kind, it must have been previously established before some competent tribunal, and due notice given of the adjudication to the electors at the poll: — if the disqualification arise from *office*, it must be clear, in point of *law*, that the office disqualifies, and knowledge of the *fact* of the candidate holding it must be brought home to the electors at the election. [*Second Southwark. Cliff.* 130. — *Second Canterbury, ibid.* 353. — *Fife*, 1 *Luders*, 455. — *Leominster, Corbett & Dan.* 1. — *Rex* v. *Hawkins*, 10 *East*, 211. 2 *Dow's R.* 124.]

3. Lord Glenbervie suggests another question, which he seems to think would depend on the determination of that last canvassed. "If a

" candidate or his agent give or promise money " or other reward to a voter, in order to procure " his vote for such candidate, and the voter " afterwards vote for another candidate, is the " first thereby disqualified from sitting even if he " have a majority of legal votes?" [2 *Doug.* 414.] That the candidate's conduct in this case amounts to the legal offence of bribery, so as to subject him to the penalties of the statute of 2 *Geo.* 2., has been decided by the Court of King's Bench, in the case of *Sulston* v. *Norton*, [3 *Burr. Rep.* 1235.] — for under the words of the statute, " corrupt or procure any person to give his vote," the offence of corrupting is held to be complete, although the voter fly from his bargain, and do not vote according to the bribe. But the question is, does the incapacity ensue so as to vacate the seat? Now, if the money in Lord Glenbervie's question is supposed to be given before the teste of the writ, &c., or after the election, so as to be out of the statute of *William*, then the question seems to be in effect *idem per idem* with that last discussed: both questions depend entirely on the effect of bribery, independent of the statute; and the law decides, that whether the party vote for or against the bribing member makes no difference as to the member's guilt in giving the bribe. But if Lord Glenbervie's supposes the case of money given *after* the teste, and before the

election, so as to be *within* the statute of *William*, then there can be no doubt, according to the settled construction of the statute, that the seat is void, though the offending candidate has the majority of legal votes; — and certainly if the courts have decided it to be bribery within the statute of *2 Geo. 2.* to give money for a vote to an elector who votes against the member, it would seem to be even more clearly so within the statute of *William*. In the former act, the words are "corrupt or *procure* a person to give his vote;" in the latter, they are, "give, present, or allow to any person having a vote any money, &c., *in order to be elected*," &c.

CHAP. VIII.

ON THE LEGALITY OF PAYING TO VOTERS THEIR REASONABLE EXPENSES, AND A FAIR COMPENSATION FOR LOSS OF TIME.

If the frequency and notoriety of a practice afforded any clear inference as to its legality, it might seem superfluous at the present day to enquire whether it is lawful for candidates to convey absent voters to and from the place of election, and to pay them their reasonable subsistence, and a compensation for loss of time occasioned by attending the poll; but as it is not necessary to look beyond the subject of elections to discover abundant instances of established usages which the law rather connives at than sanctions, and as no laws are so difficult of enforcement as those against treating and bribery, it cannot be rationally concluded that any practice may not fall within their operation, because they may not hitherto have had the effect of suppressing it. But though the usage in this instance has been uniform for a considerable period, the legal authorities on the subject are far from being so; and it still seems to be a question open to be decided quite as much upon

principle as upon authority. This is in some degree the case with most unsettled questions of election law, owing in part to the peculiar nature of the judicature deciding principally on such cases, in which the education and habits of the judges incline them to allow a greater scope to general principles, and to ascribe a less strict authority to precedent *, than they meet with in the ordinary judicial tribunals — but owing still more to the peculiar form of the proceeding before Committees, which leaves the principle and grounds of a decision uncertain, and thus prevents their determinations in general from becoming clear authorities upon definite questions of law. In cases of Petitions against returns on the ground of bribery and treating, the petitioner's case generally embraces a variety of charges; but it can seldom be gathered from the Reports on what grounds the Committee have decided. If their resolution is general, that the sitting member is duly elected, it is often impossible, and always difficult, to ascertain whether the decision is on facts or law — whether it is on failure of proof of the facts, or on the ground that the facts proved do not constitute the offence charged. — If, on the other hand, a general resolution is passed that the election is void, — or that the sitting member is guilty of

* See on this subject, Lord Glenbervie's Observations in his Introduction, vol. i. of his Reports, p. 22, 23.

bribery or corrupt practices, — or that both members are implicated in such proceedings, — it is still equally uncertain whether the judgment proceeds on the whole evidence, or only on some part in exclusion of the rest, and generally even whether the offence made out is within the statute of *William*, or within that of *2 Geo. 2.*, or whether it rests on the common law.

It is hardly necessary to premise that the present question merely and exclusively concerns fair and *bonâ fide* payments for expenses and loss of time, and that all excessive payments made under colour of defraying expenses, or giving compensation for time, but in reality as a reward for the vote, are as unquestionably corrupt and illegal as if given without any colour or pretext. The question simply is, whether such a compensation for loss of time and fair expenses can be paid to a voter without contravening the enactments of the 7 & 8 *Will.* 3. *c.* 4. against treating, and of the *2 Geo. 2. c.* 24. against bribery, or the principles of the common law on the same subjects.

First. It will be convenient shortly to state the legislative enactments, and the several decisions of Committees and of Courts of justice affecting the question; and, secondly, to offer a few observations upon it.

1. — The reader is here requested to refer to p. 65. *ante*, where the enactment of the Statute

of *William* 3., and also the parliamentary Resolution on which it is grounded are stated at length. The legislature would appear to have had in view two main objects in the Resolution and the subsequent Statute. — First, the freedom and indifferency of elections. — Second, the diminishing the heavy expenses incurred by members, and suppressing debauchery at elections. Both these evils would appear to have been flagrant and increasing antecedently to the law being passed. *Whitelock*, writing about four years before the date of the Resolution, says, that as the law permits no exemptions or restraints upon the freedom of electors, "so it forbids solicitations, bribings, or gratifying of sheriffs, head-officers, or others, by any persons, or giving money or rewards (*it were well if it extended to drink or entertainments*) to freeholders or inhabitants, to obtain their suffrages, or procure one to be elected." [*Whitelock's Notes on the King's Writ, &c.* vol. i. p. 387.]

6th November, 1669. An entry appears on the Journals. "A debate being touching the making void of all future elections which shall appear to be *procured by money*, or by *entertainments* of *meat and drink*— Resolved, that this debate be adjourned till Monday morning, and that the bill prepared to *prevent extravagancies* at and for regulating elections be then brought in and read. [10 *Journ.* 103.] And on the

2d April, 1677, (the date of the before-mentioned resolution,) " Sir Thomas Meres reports from the Committee of Elections and Privileges, to whom it was referred to consider of a paper containing a vote against *drinking* and *bribery* at elections of members to sit in parliament, for a further instruction to the Committee of Elections and Privileges, that the Committee had taken the same into their consideration, and had filled up the blank therein with 'ten pounds,' and also that the Committee had agreed to the said vote or resolve concerning the same, which being delivered in at the clerk's table, and there read, was, upon the question, agreed to, and is as followeth." And then follows the Resolution before alluded to, and on which the Statute of *William* is moulded. And on the 23d May, 1678, it was resolved that the said Order (the Resolution) do continue a standing Order of the House, and an instruction to the Committee of Elections and Privileges — and as such standing Order it remains unrepealed at the present moment.

Subsequently to this Order it appears by the Journals, that several ineffectual attempts were made to complete a legislative measure against the evils of corrupt and expensive elections. Thus, 22d November, 1680, a Bill " to prevent the offences of *bribery and debauchery* in the elections of members to serve in parlia-

ment" was read a second time. [9 *Journ.* 659.] 23d October, 1689, a Bill "to prevent abuses occasioned by *excessive expenses at elections* of members of parliament" was read a first time. Resolved, that the bill be read a second time. [10 *Journ.* 272.] These abortive attempts were finally carried into effect in the Statute of *William.* The law was no sooner passed than its provisions began to be enforced. We find on the Journals, 21st December, 1696, a few months subsequent to the passing of the act, [11 *Journ.* 682.] and in frequent dates, from time to time, elections avoided on the ground of "expending money," — of "procuring returns by bribes and treats," — and other similar offences; but for a long period no case occurred which suggested any distinction between corrupt and illegal expense, and that which was honest and legal — between an economical outlay by the member for the mere purpose of avoiding necessary expenditure to the voter; and a lavish extravagance for purposes of debauchery or corruption.

But in 1775 it would appear that, for the first time, this distinction was started. The report of the case of the Worcester election [3 *Doug.* 239.] states — "There was a considerable number of out-voters resident at London, Birmingham, Kidderminster, and other places, whose expenses were defrayed by the sitting members; and it

was contended, that when voters came from a distance to serve a candidate, it is not bribery to pay them a reasonable compensation for their loss of time. [3 *Doug.* 239.] The Committee certainly appear to have been of this opinion, as they resolved that the sitting members were duly elected. In the Ipswich case, 1784, [1 *Luders*, 41.] one of the charges against the sitting member was, that, "*under colour of payment for loss of time*, he gave, besides all expenses, uniform sums of money to the London and Harwich voters, without enquiry into their circumstances, which uniformity excluded the idea of compensation;" so that the legality of fair expenses and compensation was not questioned by the petitioner. The petitioner's case, indeed, rested on such strong evidence of bribery, under the pretext of paying expenses, that it was unnecessary for him to insist on the general illegality; and the Committee avoided the election. In the Barnstaple case, 1802, [1 *Peck.* 91.] actual payments of three and four guineas per man to several non-resident voters, for travelling expenses, were proved; but they were not insisted on by the petitioner as being contrary to law. And the Committee, in deciding that the sitting member was duly elected, perhaps may not have taken into consideration an objection which the petitioner's counsel did not suggest or argue, particularly when there

was another charge of bribery to which their attention was directed. In the case of Berwick-upon-Tweed, [1 *Peck.* 401.] amongst various charges of bribery and treating before and during the election, the petitioner objected to the payment of the travelling expenses of the out-voters who had been conveyed to Berwick and back at the expense of the sitting members, and had received from six guineas to 7*l.* and 8*l.* from each of the candidates for whom they voted for subsistence-money. The voters thus paid were in situations of life in which they earned from 20*s.* to 40*s.* a week; but there did not appear to have been any distinction in the subsistence-money allowed to them; and it was also shown that they remained at Berwick three, four, or five weeks. The petitioner's counsel contended, that the practices respecting the out-voters constituted both the offences of treating and bribery. Admitting the sum paid to be a just and measured indemnity for expenses incurred, and for time necessarily lost, it was still within the letter and spirit of the statute 7 *Will.* 3. *c.* 4. The money given was given "in order be elected." And whether for travelling expenses or expenses of any other sort made no difference, for no difference was made by the statute. But he also contended that the sums paid were enormous, and given without distinction or enquiry — they were in fact given as

bribes, *under the colour of subsistence-money*. The sitting members' counsel contended that the sums paid, though large, were not corrupt or extravagant, considering the length of the journey, the condition of the voters, and the time they were absent; and that it was not illegal to compensate voters fairly for their loss of time and expenses. The Committee decided that the election was *void* — and, by separate resolutions, declared that the sitting members acted in violation of the statute of *William*, and in violation of the laws for preventing bribery and corruption. But here the usual uncertainty exists as to the ground of decision; — and whether the Committee decided on the ground that the sums paid to the out-voters were excessive and corrupt, — or that although they were neither, they were still illegal, — or whether their determination proceeded on the other acts of bribery and treating, it is impossible to ascertain. The case of Boston [1 *Peck.* 434.] is equally inconclusive. The sitting member endeavoured to show that large sums paid to non-resident voters were paid for travelling expenses; but the evidence showed that they were paid in addition to the expenses, and there was also other evidence of bribery, so that the decision of the Committee holding the election void is of no weight one way or the other on the present question. The case of Herefordshire, in 1803,

though not involving the question as to compensation for time, is an important decision on the subject of treating; — and the more so, on account of the full and able discussion which the subject underwent before the Committee. The return of Colonel Cotterell was petitioned against by freeholders, solely on the ground of alleged acts of treating during the election, in violation of the statute of *William*. It was proved that on the three first days of the election voters were entertained at public houses in Ledbury, Leominster, and Hereford, being in some instances directed to go there by Colonel Cotterell himself, in others by persons in his employment. But it was not pretended that the entertainment afforded was at all excessive or extravagant. It further appeared that every elector who gave his vote for Colonel C. was immediately, if he would accept it, presented with a ticket, entitling the bearer to five shillings. The elector who gave Colonel C. a single vote received two tickets. These were either carried to public houses in Hereford (where the persons producing them received refreshment to their value) or were sold to men who attended for that purpose, for sixpence less than the sum expressed on them. They were afterwards carried to Colonel C.'s bankers, and the amount of them, 704*l.*, and also of the charges of the publicans before-mentioned, were paid by the bankers, and placed, with

Colonel C.'s approbation, to his account. Each of the three candidates, the Colonel, Sir G. Cornwall, and Mr. Biddulph, proceeded in the same manner as to the distribution of tickets, according to a plan concerted between them; so that every elector might receive two five-shilling tickets, one from each candidate for whom he voted, if he gave a divided vote, and if he gave a single vote, two from the candidate to whom he gave it. For the sitting member it was contended, that the statute of *William* did not prohibit *all* treating and entertainment during the election, but only *such* treating as was given "in order to be elected," — that is, as the counsel contended, with the *corrupt intent to influence* the election; — that the sums in this case, from their trifling amount, could not have been given with that intent; and that as they were given equally by all the candidates, according to agreement between them, they could not be intended to have, nor could they possibly have, the effect of influencing the voter to prefer any particular candidate. For the petitioner it was argued, that the statute of *William* did not require a corrupt intent, but rendered illegal *all* supplying of meat, drink, and entertainment by the candidate to voters *during the election;* and that the words, "in order to be elected," did not refer back to the passage as to "giving entertainment," but only applied to the clause immediately preceding

them, as to "promises and engagements," and that the Court of Common Pleas had so construed the act; but that, even admitting that the entertainment must be supplied "in order to be elected," it was impossible to conceive for what other object the tickets and provisions could have been furnished by Colonel Cotterell. The Committee decided, after long argument, that Colonel Cotterell was *not duly elected.*

In the case of the Radnorshire election, 1803, where the facts charged against the sitting member were very similar, the Committee came to a different conclusion, and held the member duly elected. [1 *Peck.* 494.] The counsel for the sitting member, however, pressed the distinction between this case and that of Herefordshire, since here there was no sum marked on the refreshment-tickets, and there was no proof of any of them having been *exchanged for money*, which was a strong feature in the former case. It also appeared that Presteign, the county town, was situate at the extremity of the county, on the borders of Herefordshire. In the Durham case [*2 Peckwell*, 176.] the question was again discussed as to sums of money paid for the conveyance of voters from London to Durham and back, and for their subsistence during the election. It was proved that several persons residing in London had received, some time before the election, about *5l.* each in ad-

vance from the agents of the sitting member — that they had been conveyed at his expense to Durham several days before the election began — that in most cases they had been maintained there on an allowance of 12*s.* 6*d.* a-day, and were allowed 8*s.* a-day for loss of time, and that they received 7*l.* 13*s.* to pay their expenses back to London. For the sitting member it was contended, that these expenses were reasonable and not excessive, and that being so they were legal. The petitioner contended that they were at all events illegal; but as he also urged that they were extravagant and corrupt, and a consideration given for the votes, and as there was also proof of acts of bribery in London before the election, the decision of the Committee, generally declaring the election void, cannot be taken as an authority, one way or the other, on the question now under consideration. It is clear the Committee cannot have considered the expenses legal: — it is not clear on what ground they held them illegal.

I am not aware of any subsequent case before a Committee in which this question has been mooted. In courts of law the question has been once or twice raised. Two cases at Nisi Prius are stated in Clifford's Report of the two Southwark elections. The first, *Smith* v. *Rose*, was cited by Mr. Tierney in supporting his petition in the Southwark case. The case is thus stated:

"Mr. Rose, the Secretary of the Treasury, "having, at the election for Westminster in "1789, opened the house of Smith, a publican, "on behalf of Lord Hood, Smith brought an "action against him in the Court of King's "Bench, and recovered the amount of his bill. "The learned judge, Lord Kenyon, would not "have permitted him to recover had the open-"ing his house been an offence at common "law or on the statute; nor did he find either "that Mr. Rose or the publican had been pu-"nished for a contempt of the House of Com-"mons." Now, Mr. Rose could have no defence to the action, unless an offence against the statute was committed, in which he and the publican were implicated and *in pari delicto*. But the statute in no way prohibits *third* persons to treat; and it did not appear even that Mr. Rose was in any way connected with the candidate, or that the defence of illegality was attempted: so that the case decides nothing on the question. The other case stated by Mr. Clifford, p. 371., is that of *Ridler* v. *Moore and another*, tried before Lord Kenyon at the Gloucestershire assizes, 1797. It was an action brought by a publican of Tewkesbury against the defendants, as unsuccessful candidates at the election for that borough, to recover the amount of a bill for treating and entertaining during the election the voters in the interest of the defendants.

But it seemed that there were a few *other trifling items* in the bill. It appeared that, by the orders of the defendants' committee, a person who attended the hustings informed each voter, immediately on his having polled for either of the defendants, what public houses were open in their interest, and gave them a ticket, entitling them to entertainment in the house which he preferred. The examination of the witnesses was directed to show that many acts were done by individual members of the Committee without either the participation of the others or the knowledge of the defendants. But Lord Kenyon held that the committee were collectively and individually agents, and that the defendants were answerable for every act done by any of them. It appears, therefore, that the sole defence made (though the defendants each employed counsel) was on the want of authority in the parties ordering the entertainment, and that the objection was never set up, that the entertainment was illegal within the act; a defence which certainly Lord Kenyon was the last Judge*

* In the debate on the second reading of Mr. Tierney's Bill in 1806, for prohibiting payment of voters' expenses, this action was alluded to, and Mr. Francis, one of the defendants, who rose in consequence of the allusion, says, after some sarcastic remarks on Lord Kenyon's conduct: "If the Treating Act, as it then stood, vacated any action, "and ought to have nonsuited any plaintiff, I presume it "was the duty of the Judge to advert to such act, and to

to suggest, unless strictly pressed by the defendants.

In the next year, the case of *Ribbans* v. *Crickitt* came before the Court of Common Pleas. [1 *Bosanquet & Pull. Rep.* 264.] The demand of the plaintiff, who was an innkeeper at Ipswich, was partly for provisions furnished to voters before the teste of the writ, and therefore not within the statute of *William*, partly for provisions furnished during the election to *resident* voters, and partly for provisions supplied to voters *non-resident*. The defendant admitted the legality of the first and last portions of the claim, and only disputed the demand for entertainment of resident voters. The plaintiff having recovered a verdict, the question was argued before the Court on a motion for a new trial. — For the plaintiff it was contended, that it ought to be shown that the entertainment was supplied "in order to be elected," otherwise the case was not within the statute, since these words applied to the whole of the enactment. For the defendant it was contended, that these words only

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"let the law take its course, even against his own tender "feelings for the plaintiff. All I know is, that Lord Kenyon "did not take notice of it; that he gave a violent and re- "proachful charge to the jury against us, and that, in the "end, we paid the full demand of the innkeeper, within a "trifle. We never pleaded the statute." — COBBETT's Parl. Deb. vol. vi. p. 509.

applied to the latter part of the clause, (meaning the provision as to "promises or engagements," &c. — see *ante*, p. 66.) and to this construction *the Court agreed*, and Chief Justice Eyre said: — "It seems to be the opinion of the whole Court, "that if the defendants think proper to insist "on their objection, they must do it with success. "This action is apparently founded on a contract "to disobey the law, being to provide entertain- "ment for voters during an election. The de- "fence set up proves the principle of the con- "tract; for the point contested at the trial was "whether or not the plaintiff had abused the "confidence reposed in him, by squandering the "provisions among persons who were not voters; "then how shall an action be maintained on that "which is a direct violation of a public law? "The contract is bottomed in *malum prohibitum* "of a very serious nature in the opinion of the "legislature, as appears by the preamble of 7 & "8 *Will.* 3. *c.* 4.: how then can we enforce a "contract to do that very thing which is so much "reprobated by the act? I am perfectly aware "great difficulties may arise from construing this "act rigidly, but perhaps still greater will arise "if it be not so construed. It is true, that a "voter who comes from a distance may have "reason to complain if he is not provided with "necessaries; but it is also obvious that if the "candidate can supply him, he may supply him-

" self. *If any exception is to be allowed for voters* " *not resident, the whole mischief in the act will* " *necessarily follow.* It will be impossible for the " candidate to make a distinction between those " voters who reside at a distance and those who " live within half a mile of the place of voting. " The legislature has drawn a strict line, which " is not to be departed from: it says, that after " the teste of the writ no meat or drink shall be " given to the voters by the candidate; and that " being the case, this Court cannot give any " assistance to the plaintiff consistently with the " principles which have governed the courts of " justice at all times, and with the cases which " have been cited this day. Persons who engage " in this kind of transactions must not bring their " case before a court of law."

The judgment thus pronounced by Chief Justice Eyre and the Court of Common Pleas was some years afterwards sanctioned and also extended to the case of *non-resident* voters, by a very learned judge deceased, Mr. Baron Wood, in the case of *Lofhouse* v. *Wharton*, tried at the Durham assizes in 1808, stated in 1 *Campbell's Rep.* 550. " The action was brought for meat, " drink, and entertainment supplied by a pub- " lican to non-resident voters at the election for " the city of Durham, by the desire of the de- " fendant, one of the candidates. For the " defendant, it was insisted that this came within

" the treating act 7 & 8 *Will.* 3. *c.* 4., on the " authority of the case of *Ribbans* v. *Crickitt.* " The counsel for the plaintiff took a distinction " between resident and non-resident voters, and " urged that in the case cited it was determined " only that it was unlawful to treat *resident* voters " after the teste of the writ, and that the opinion " seemed to have been that *non-resident* voters " were not included, as money was paid into " Court, in that case, for the provisions supplied " to this class. — Wood, Baron — I think the " plaintiff cannot recover: — the act of par- " liament makes no difference between *resident* " and *non-resident* voters; and the case of *Rib-* " *bans* v. *Crickitt* is exactly in point; and the " plaintiff was accordingly non-suited." Two cases of determinations at Nisi Prius are cited very briefly by the counsel for the sitting member in the Herefordshire case, in which two learned judges of high authority held, that a reasonable compensation for loss of time and travelling expenses was not within the meaning of the Bribery Act, 2 *Geo.* 2. *c.* 24., so as to subject the voter asking for it to the penalties of that statute. The cases are thus mentioned: " In the case of *Wharton* v. *Lunn*, at York, Mr. " Baron Thomson, who tried the cause, told the " jury that if the money was given as a reason- " able compensation for the loss of time and " travelling expenses, the statute did not apply,

"but that they must be convinced it was not the "colour for a bribe. In the case of *Smith* v. "*Sleigh*, which was an action brought against a "voter for asking 30*l.* to go to Durham, and 30*l.* "to return, Lord Ellenborough stated the ques- "tion to be, whether the sum sought for was as "an indemnity for the voter's expenses, or as a "consideration for his vote; and that, in the "former case, the voter was not an offender "within the statute." [*2 Peck.* 182.]

The above decisions are all that are to be found in print at all bearing on the present subject.

The Berwick, Boston, and Durham cases may be laid aside as cases of corrupt and extravagant expense, merely cloaked under the pretext of fair compensation. The decision in the Worcester case is an express adjudication, after argument, of the legality of paying fair travelling expenses. In the Ipswich and Barnstaple cases the legality was conceded. The Herefordshire case, in which the election was avoided, was decided entirely on the express enactments of the Treating Act of *Will.* 3.; and although the money and provisions furnished in that case were so limited in amount as to be entirely free from excess, and from all clear indication of corrupt intent, still, as the money tickets were dealt out equally and generally, without any pretence of being a measured compensation for the individual voter's expenses, and as two tickets were given for a double vote,

the facts did not fairly raise the question of the legality of strict compensation under the Treating act — and perhaps, therefore, the case can hardly be considered as breaking in on the uniformity of the decisions of Committees in favour of the legality — and, at all events, the case stands entirely clear of the Bribery statute, and in no way touches the question whether fair compensation, if not paid during the election, amounts to bribery under that statute or at common law. The Radnorshire case also turned on the Treating act; and as there was proof of moderate refreshment being furnished during the election, and as the Committee held the election valid, they would appear, in this case, clearly to have construed the act as prohibiting only corrupt and excessive, and not fair and necessary entertainment. The practice, therefore, of committees — with the single exception of the Herefordshire case, if, indeed, it is one — appears to have been uniform. In every case where the question of indemnity for expenses has fairly arisen, such indemnity has been either decided or conceded to be legal — and the Committees would seem to have generally considered that neither the Treating act nor the Bribery laws were infringed by payment of fair expenses.

Among the cases before the Courts, the Nisi Prius cases before Lord Kenyon require no further notice. The decisions of Lord Ellenborough

and C. B. Thomson support the doctrine of the Committees, as far at least as respects the Bribery act of *Geo. 2.*; while the deliberate judgment of the Common Pleas cannot be considered (as far as the point in decision goes) as an authority at variance with the Committees or with those learned Judges. The case of *Ribbans* v. *Crickett* decided nothing beyond this — that the treating of *resident* voters during the election was illegal within the Treating act, — a doctrine which clashes with no authority, nor with the narrowest construction of the statute. When the learned Chief Justice goes beyond the case, and delivers his opinion extrajudicially as to the illegality of entertaining *non-resident* voters, he is still speaking merely with reference to the provisions of the Treating act, and of entertainment furnished *during* the election — his doctrine is here inconsistent with that of the Committees — but no inference can be drawn from his language one way or the other, as to what might have been his opinion on the question of fair compensation considered with reference merely to the Bribery act, which was the sole question before Lord Ellenborough and Lord Chief Baron Thomson. — The case before Mr Baron Wood undoubtedly supports the opinion of Chief Justice Eyre to its full extent, and is equally free from any inconsistency with the decisions of Lord Ellenborough and Lord Chief Baron Thomson. These eminent Judges were,

in fact, deciding on different questions arising under different statutes — and had they been in exchanged positions, there is not the least reason to infer that they would have decided differently from what their learned brothers actually held.

The question, therefore, comes to this — First, Which is the sounder construction of the Treating act, that which allows, or that which prohibits, fair compensation to voters? Second, When the facts do not fall within the Treating act, are the decisions of Lord Ellenborough and Chief Baron Thomson sound authorities that compensation is not an infringement of the Bribery act?

1. With respect to the Treating act. According to the construction of the Court of Common Pleas the enactment of the first section is to be divided into two parts, and the first part of the clause prohibiting the "giving or presenting" to voters money, meat, drink, or entertainment during the election, is held to stand as a separate and unqualified injunction, not within the controul of the words at the end of the section, "in order to be elected, or for being elected;" and these words, it is said, only apply to the latter part of the section prohibiting "promises, agreements, or obligations," to give money, entertainment, &c. On the other hand it is said that the whole clause is one continued sentence, and that the words "in order to be elected, or for being elected," override and controul the

whole enactment, and, consequently, that the act does not prohibit *all* giving of money and entertainment to voters in *all* cases, but only where it appears from the circumstances and the amount to be given "in order to be elected," or as the argument arbitrarily — as I humbly conceive — construes these words, *in order corruptly to influence* the election. According to the former construction the intent is immaterial, — the act of giving the money or entertainment is the specific offence created by the statute. According to the latter interpretation, the intent of influencing votes is the essence of the offence, and must be shown either from collateral facts or be clearly inferable from the amount, or accompanying circumstances. In support of the former construction it is urged that the legislature appear from the title and preamble, as well as from the language of the Resolution on which the act is moulded, and from the lights thrown on the point by the contemporary entries on the Journals, to have had a twofold object, — that of lightening the heavy expenses of members as well as repressing corrupt practices. On the other hand, it is said that the object to be gathered from the preamble is merely the repression of *bribery*, and the securing the "freedom and indifferency" of elections — that expense was not a primary object of the legislature, but that it was only to be suppressed in as far as it

was the root and means of corruption. — Now what are the terms of the title and preamble? The act is intituled, "An act for *preventing* "*charge and expense* in elections of members to "serve in parliament." The preamble recites; "Whereas grievous complaints are made, and "manifestly appear to be true, in the kingdom, "of *undue* elections of members by *excessive* "*and exorbitant expenses*, contrary to the laws "and in violation of the *freedom* due to the "election of representatives for the Commons of "England, to the great scandal of the kingdom, "dishonourable, and may be destructive to the "constitution of parliament; therefore, for re- "medy therein, and that all elections of mem- "bers to parliament may be *freely and indiffer- "ently made, without charge or expense*, be it "enacted," &c.

Now, whatever may be the spirit of this preamble, it does not afford much help towards removing the doubt on the construction of the enacting clause — but certainly that construction, which would raise an argument from it that the statute was levelled merely and exclusively against bribery appears gratuitously to contract its meaning. The plainer and more obvious spirit of the title and preamble, as I submit, shows the act to be directed neither against expense alone, nor bribery alone, but against both — against charge and expense as a burthen

on members, and as a means of corrupt influence. The object was at once to reduce expenses, and by doing so, to insure the freedom of elections. It is impossible to say that either object predominates over the other. But *quacunque viâ datâ*, the difficulty remains, after all, to be solved almost entirely where it arises — within the strict limits of the enacting clause; and as the question somewhat depends on nice construction of language, I would beg the reader's attention to the entire enactment. After the preamble the act enacts, "That no person hereafter to be elected "to serve in parliament for any county, city, or "place, &c. *after the teste* of the writ of sum- "mons to parliament, *or after* the teste or issu- "ing out or ordering of the writ of election upon "the calling of any parliament hereafter, *or after* "any such place becomes vacant hereafter in the "time of this present or any other parliament, "shall or do hereafter by himself or by any "other ways or means on his behalf or at his "charge, *before his election* to serve in parlia- "ment for any county, &c. directly or in- "directly give, present, or allow to any persons "having voice or vote in such election any mo- "ney, meat, drink, entertainment, or provision, "*or make* any present, gift, reward, or entertain- "ment, *or shall* at any time hereafter make any "promise, agreement, obligation, or engagement "to give or allow any money, meat, drink, pro-

" vision, present, reward, or entertainment to or " for any such persons in particular, or to any " such county, city, port, or place in general, or " to or for the use, advantage, benefit, employ- " ment, profit, or preferment of any such person " or places, *in order to be elected, or for being* " *elected*, to serve in parliament for such county, " city, &c. or place."

Now, looking attentively at the whole of this clause, I cannot discover, in its fair spirit and sense, any ground for applying the qualifying words, " in order to be elected," &c. to the latter part of the clause alone, any more than to the whole of it. Why promises or agreements to give money or entertainment should be only prohibited when made in order to the election, while the actual giving money or entertainment is to be enjoined without reference to its object, I do not very clearly see. On the contrary, it may perhaps be fair to say that the former clause requires certainly not less than the latter the operation of the qualifying words — for meat and entertainment *actually given* to the electors, if moderate, might stand, on the plea of fair seasonable hospitality, unless so given to influence the election, or to have that intent; but it is difficult to conceive how any deliberate promise, obligation, or engagement during the election can be entered into prospectively with the voter with any other view than to influence his vote. But if the words do not apply to the

whole, to how much of the clause are they to be referred? Attentive perusal will show how difficult it is to find a break in the sense, where, in fair grammatical construction, a limit can be placed to the operation of the qualifying words. If the words only embrace that part of the section which follows after, "or shall at any time hereafter make any promise," then they leave the sense of the preceding clause, "make any present, gift, reward, or entertainment," incomplete — since these last words obviously require connexion with the subsequent words, "to or for any persons." If, on the other hand, the antecedent to which the relative words, "in order to be elected," refer, is to begin at "or make any present, gift, reward, or entertainment," then the qualification extends beyond promises and engagements, and embraces actual gifts and entertainments; and then on what principle can it be stopped short here, and restrained from controuling the whole previous clause as to actual giving of money and entertainment? I am aware that grammatical criticism cannot in general be applied as a fair test of the meaning of acts of parliament, and particularly of those made at the distance of the reign of *Will.* 3.; but when the spirit and sense are shown to admit and even to require a particular construction of a clause, it is at least satisfactory to see that grammar equally demands it. If, indeed, the application of the con-

trouling words to the whole clause would interfere with what appears to me the plain spirit and object of the act, viz. the eradication of the double evil of expense and corruption, and would convert the act, as has been often contended by those holding this construction, into a mere statute against *bribery*, I should hesitate to adopt such a reading of the enactment as would tend to defeat one of its declared objects; and I should even prefer the construction of the Court of Common Pleas, which would in that case appear more consistent with the title and preamble, though I think, on the whole, not so fair an interpretation of the sense of the main clause. But I shall presently show that even adopting this narrower construction in its legitimate extent, the act, in sound interpretation, will still as effectually apply to the recited evil of charges and expenses at elections, as if the more sweeping construction of the Common Pleas were put upon it. Looking, therefore, at the whole of the clause together, it appears to me, in spirit and sense, as well as in grammatical construction, clearly one entire sentence incapable of division, and in which the closing words, " in order to be elected, or for being elected," cannot be restrained to any one part of the clause more than another, but must be held to qualify and controul the sense of the whole.

But while I adopt the qualifying words into the whole clause, according to the construction generally contended for by sitting members, and particularly in the Herefordshire case, I cannot by any means give to the qualification the confined and narrow import generally ascribed to them, and which, as it appears to me, would go unwarrantably to limit the effect of the provision to only one mischief, while the legislature had two in view, and while their language, in fair interpretation, is amply sufficient to meet both. — The fallacy, as I humbly submit, lies in ascribing a much narrower and more restricted meaning to the words, "in order to be elected, or for being elected," than in fair sense belongs to them. They are construed as if synonymous with "*corruptly to procure or influence votes;*" and on the strength of this construction it is at once assumed that the prohibition of the act only aims at corrupt practices — that it was not properly an act against treating, but against *bribery by treating* — that the offence under it depends entirely on the same corrupt *animus* as the offence of bribery under the bribery laws — and that no supply of money or entertainment during the election falls within it, unless shown either from its extravagance or from other facts to proceed from a corrupt intent to bribe voters. Now I submit that the enactment, though subject to the controul of the closing words, goes far be-

yond this extent. — Money or entertainment given *in order to* an end is one thing — a *corrupt bribe for* that end is another: I admit that they nearly approximate, but they are not necessarily identical. One thing may be done in order to another thing, without being a corrupt means of procuring it. — The money paid for the expenses of hustings, clerks, &c. is money paid "in order to be elected," and would, if paid to voters, be within the act; but can it be said that it is in any sense paid in order *corruptly* to influence the election? Where money is paid for moderate refreshment to voters by all the candidates equally, and in trifling sums as in the Herefordshire case, the circumstances negative the idea of a corrupt bribe; but can any other assignable cause be discovered for which it is given than "*in order* to the election" of the candidates? That this was the opinion of the Committee in that case is evident from their avoiding the election, unless, indeed, which is not probable, they adopted the construction of the Court of Common Pleas, excluding the effect of these words. It may, perhaps, be said, that this construction gives no effect at all to these qualifying words, and that they mean nothing where they stand, if they do not refer to corrupt influence and bribery, since, on any other interpretation of them, the general enactment with them will not be less sweeping

in its operation than if they did not appear in the act. But if they are construed to mean, as I submit they should be, "in reference, or with a view to" the election, they will have the effect of saving any fair payments by candidates to voters for matters unconnected with the election from falling within the sweeping prohibition, which they would otherwise certainly do. Without these words, a fee to a physician, a payment of a debt to a tradesman, a gift to a friend *during the election*, must fall within the strict unqualified words, "money paid to a person having vote;" and the legislature, therefore, may be considered to have meant, in qualifying the general prohibition, to prevent its applying to any distinct and honest transactions between the voter and candidate unconnected in any way with the election, at the same time leaving it to apply to every possible case of money or provision given in any way with reference, or relation, or *in order* to the election. For the object of striking at the root of the evils of bribery and heavy charges, they meant to prohibit as illegal *all* payments, or gifts of money, or entertainment to voters, save and except those ordinary dealings which might arise between the candidate and the voter in any distinct relations of life. They are, therefore, not to be considered to have enacted, that no money, &c. shall be given to *corrupt voters*

(which the bribery laws alone sufficiently prohibit); but more than this — that no money shall be given to voters *in any way in reference to* the election. Money given to corrupt is of course included; but the expression seems to include more, — and extends to all money or provision given to a voter, where no other motive or cause for the gift can be suggested, than the relation subsisting between candidate and voter at the election.

Observe how this construction precisely harmonises with the language of the Resolution on which the act is founded. That Resolution is manifestly levelled at treating and expense, and cannot possibly be intended to apply merely to bribery. The words are, that if any person "shall, after the teste, &c. (as in the act) at "any time before the day of his election give "any person or persons having vote in such "election any meat or drink, exceeding in value "10*l.* on the whole, in any place but in his own "dwelling-house or habitation, being the usual "place of his abode for six months last past, "or shall, before such election, make any "other present, gift, or reward, or promise, "obligation, or engagement, &c., every such "entertainment, present, gift, or reward, is by "this House *declared to be bribery!*" and being duly proved, shall be sufficient ground to make the election void. Under this Resolution, there-

fore, all questions as to corrupt intent, all inferences of *malus animus* to be sought for from the amount or circumstances of the treating, are altogether excluded; the mere fact of treating in any degree or circumstances, if above 10*l.* *in the whole*, (not to an individual voter,) is absolutely declared to be bribery, and to avoid the election, and this Resolution exists now unrepealed as a standing order of the House of Commons. If the act, therefore, does not go so far as the Resolution, still the Resolution remains a governing rule of the House of Commons, binding at least on Committees, whatever may be its effect in a Court of law. But when the legislature, as appears by the Journals in the entries before cited, and from the preamble of the act, had found that the evils complained of had increased, and that the order of the House was insufficient to restrain them, it is surely impossible to suppose that they intended by the act to do less than the House had done by their order; but rather, on the other hand, that they intended to take the Resolution as the basis of their enactments, and to strengthen and extend its provisions rather than to weaken and qualify them. And, accordingly, we find that the act does not admit even the exception of meat and drink, under 10*l.*, furnished at the member's house — that probably having been found to open a door to extravagant and corrupt treating

— but the act generally declares illegal all giving of money and entertainment whatever. If treating amounting to bribery was all that the legislature aimed at, why limit the offence to the period of the election, when the common law alone, without any parliamentary Resolution, or any statute, prohibits bribery at *all times*, and, as appears in a former page, imposes on the member the same disabilities and incapacities as the statute? It is also to be observed, that the word "corrupt," the technical phrase employed in all acts, and used in the Journals whereever bribery is referred to, does not occur once either in the preamble or in the enactment of the statute. If, then, this is the sound construction of the Treating act, it follows as a matter of course that any giving of money, or provision, or entertainment, however moderate, to voters of any kind by the candidate *during the election*, (that is, from the teste of the writ to the close of the election,) falls within the act, and is consequently illegal.

Secondly, But inasmuch as such payments may be, and frequently are, made to the voters, either before or subsequent to the election, in which case they could not fall within the terms of the Treating act, it is necessary to enquire whether, independent of its provisions, they would be rendered illegal by the common law, or the Bribery act of *2 Geo. 2. c. 24.* The

question here, being entirely set free from the strict terms of the Treating act and Resolution, depends solely on the common law and the Bribery act. The seventh section of this act enacts, "That if any person who hath, or "claimeth to have, any right to vote in any "election, shall ask, receive, or take any money, "or other reward whatsoever, to give his vote, "or if any person, by himself, or any person "employed by him, doth or *shall by any gift or "reward, or by any promise, agreement, or se-"curity for any gift or reward, corrupt or pro-"cure any person to give his vote*, such person "so offending shall forfeit 500*l*." &c. &c. On the construction of this clause, and of course without the least reference to the Treating act, it was that Lord Ellenborough and Chief Baron Thomson both directed juries that a voter asking of the candidate a fair and reasonable indemnity for mere expenses and loss of time did not incur the penalty of the act, as being guilty of the offence of "asking for money "or reward to give his vote."

The question is, Can such money be held in any sense to be a remuneration or consideration for the vote, which is strictly confined to an indemnity for expenses actually incurred, and gains actually lost by the voter's attending on the election? Indemnity and compensation, from the force of the terms, exclude all idea of

profit or reward. The voter is placed *in statu quo*, as if he had not travelled to the poll. The candidate prevents his *losing* by his attendance; but if his bare expenses are paid it is obvious he *gains* nothing. Indemnities to public officers and ministerial officers of justice are every day given by parties requiring them to do some official act in their favour; and such indemnities were never held to be illegal. And the Courts will often even refuse to compel the officer to act without the indemnity; as in the case of sheriffs called upon to execute or make returns to writs, of trustees required to perform acts of doubtful legality. But was it ever contended, even in argument, that such indemnities could be construed into corrupt bribes to the parties to procure them to act? A witness is entitled to be relieved from all expense of attending a court of justice, and in many cases is not compelled to attend till his expenses are paid; but was it ever imagined that a witness thus brought to the trial at the expense of the party could be considered as bribed by the suitor bringing him? or was an objection ever made to the competency of his evidence, on the ground that he was bought over by the bare payment of his expenses? The money paid to the voter is not paid to remunerate for his vote, — since remuneration implies profit, — it is paid simply to take away the obstacle of expense, which

would otherwise prevent his exercising his franchise at all. When he arrives at the poll he is in the situation of a resident voter, — his vote is equally voluntary, — he is not bound to vote for the candidate who conveyed him, and can, with an equally clear conscience, take the oath that he has not received or had, directly or indirectly, any money, gift, or reward, in order to gain his vote. But it may be said that the elective franchise is an advantageous right which it is beneficial to the party to exercise, and that the candidate, by removing the incapacity to exercise it, arising from the voter's circumstances, in effect confers a benefit on the voter. It may be admitted that the possession and exercise of the elective franchise are in a general sense beneficial to the elector; and if the candidate conferred the franchise on him by giving him a freehold, or paying his rates, &c. there can be no question that such consideration would be corrupt bribery. But the voter is already in enjoyment of the permanent franchise. This he does not acquire from the candidate, — and it cannot be made out that he gains any thing which can come within the description of "money, gift, or reward," by the exercise of it on the particular occasion, which is all that the candidate enables him to do.

Questions have arisen as to the legality of paying for the admissions of freemen, in order to enable them to vote for the candidate paying

the money. And it would seem, from the Worcester case, [*Corbett & Daniel's Reports*, 178.] that this practice is not illegal; and yet this has far more of the semblance of bribery than a compensation for expenses; since the freeman is put in possession of a franchise which is permanent, and which gives him rights and capacities which he would not otherwise enjoy, whereas the voter conveyed to the election derives nothing of benefit, but is barely saved from pecuniary loss. If such payments do not fall within the statute, still less are they within the spirit of the common law against bribery; for whatever may be the case under the strict letter of a statutory enactment, it is clear that at common law nothing can be bribery but where the *animus* is affected with corrupt motives — and it is surely absurd to talk of a mere indemnity operating to corrupt the will; — a negative bribe is a solecism in language, — a negation of all profit or advantage cannot operate as a corrupt motive, or as any motive at all. It is difficult to imagine a system of law or morals more absurd than that which would inflict punishment on a man as corrupt, not for having corruptly acquired money, but for having expended none, — not for having received money from the candidate, but for having laid out none in the candidate's service, — not for having corruptly sold his vote, but for not having bought

the means of giving it. The result of this enquiry therefore leads me to conclude,

1st. That a fair indemnity for expenses and loss of time, if paid to the voter at such a time as to be free from the operation of the Treating act, (that is, before the teste of the writ, or after the election,) is clearly legal.

2d. That if the money is paid or the entertainment furnished *during* the election, so as to fall in point of time within the Treating act, then, according to my humble construction of that act, it must be illegal. And if the construction of the Court of Common Pleas is adopted, the same conclusion will follow *à fortiori*; — but if the act is to be construed to apply only to money, &c. given corruptly to influence the election, then the payment of fair compensation and expenses is no more illegal under the Treating act than it is held to be under the Bribery act.

I have purposely omitted noticing, in the course of the argument, the well-known speech of Lord Mansfield in the House of Lords, on the subject of Lord Mahon's Bill in 1783, for rendering more effectual the laws against bribery. The reports of the speech are not very satisfactory; and the precise nature of the provisions of the bill on which he was commenting is so imperfectly stated, that as an authority on a strict legal question the speech cannot have the weight

of a clear judicial decision. As far, however, as his opinion can be collected with certainty, that eminent Judge appears to have held that the payment of voters' expenses, and of compensation for lost time, were generally illegal. The Journals afford no information as to the particular provisions of Lord Mahon's Bill, but only give the title of it — "An Act for the better preventing the evils of bribery and expense at the election of members to serve in parliament." And it appears that Lord Mahon took it up to the House of Lords on the 15th March, 1784. [39 *Journ. p.* 1047.] Mr. Luders states [1 *Luders*, 69.] that the first section inflicted a penalty of 500*l.* for giving any reward or entertainment to an elector, "on account of such "person having voted at such election, or for, or "on account of, or under pretence or colour of "any loss of time or expenses incurred by such "person on account of such election, or in or by "his travelling to or from the place of election "or of polling." The bill underwent much discussion and amendment in the Commons, and appears to have contained a clause legalising the payment of expenses under certain restrictions. Mr. Luders says, "Its supporters in the "House of Commons explained it to be an al-"lowance of such payments, provided they did "not come to the *voters' hands:*" thus a candidate (it was said) might pay a coachman for

carrying his friends to the election, but not the *voters themselves* for coach-hire.

On the 23d March, on a motion to print the bill, Lord Mansfield left the woolsack, and addressed the House. He said "he was glad "to receive a motion to have it printed, be- "cause it was a bill on a subject of importance, "and upon a subject that ought to be fully un- "derstood, as the country, if report spoke truly, "was upon the eve of a general election. To "the principle of the bill he had no objection; "*because it did no more than declare that to be* "*law which was law already.* It did not, there- "fore, in his mind, go too far in principle; but "he had strong objections to the passing the "bill, and those objections rested altogether on "there being no necessity for any such statute. "By the common law of the land, and by a "variety of statutes, the crime of bribery was "clearly and sufficiently ascertained. Their "titles and preambles ran pretty much alike in "terms to the terms of the title and preamble of "the present bill; for which reason every bill "brought in avowedly to prescribe new pre- "ventions and oppose new impediments to "bribery, tended rather to narrow and con- "tract the law against bribery than to enlarge "and enforce it. He gave the author of the "bill full credit for his good intention. His de- "sign, however, was fruitless, and could not

" answer the end it aimed at. The law was " sufficiently extensive already, and it had bet- " ter remain as it was, than be weakened, as it " must unavoidably be, by the alteration pro- " posed. *His Lordship pointed out how liable* " *the part of the bill allowing voters to be paid for* " *their loss of time was to fraud and abuse.* The " vague manner in which this passage was " worded invited imposition and countenanced " corruption. Men's time was a matter of great " difficulty to appreciate; a minute might be of " more value to some than hours to others. Un- " der the idea, therefore, of paying for the time " of voters, every purpose of bribery might be " answered. In order to show that the idea of " *allowing victuals and drink to voters was by* " *no means a new one,* His Lordship diverted the " House with a quotation from an ancient do- " cument drawn from monkish Latin. He ad- " verted also to other parts of the bill, and com- " pared them with the law as it stood, showing " that if the public would but set their faces " against the fact, and bring it home to the offend- " ers, the laws in being for prevention of bribery " at elections were so fully adequate to the evil, " and gave such complete authority to inflict " a proper punishment, that there was not the " smallest necessity for an additional statute upon " the subject. He said it had been suggested to

" him, that, in a Committee * of the House of " Commons, constituted agreeably to Mr. Gren- " ville's act, it had been declared that *the can-* " *didates having paid money for the purposes* of " the present bill were not guilty of bribery. " *Every such decision that had been made has* " *been clearly illegal; a fact which a reference* " *to the statutes already in being would demon-* " *strate most incontrovertibly.* So strong, so " extensive, and so effectual was common and " statute law in being against bribery at elec- " tions, that it appeared to him that the framer " of the bill under consideration was ignorant " of the law as it stood already, or he never " would have thought such a bill as the present " necessary."

The bill was ordered to be printed, and the next day the parliament was prorogued, and on the 25th of March it was dissolved. [*Debrett's Parl. Reg. v.* 14. *p.* 151.]

* This was supposed to allude to the case of Worcester, in 1775, stated above.

CHAP. IX.

WHETHER FREEHOLD ANNUITIES GRANTED BY WILL QUALIFY TO VOTE WITHOUT REGISTRATION.

THE act 3 *Geo.* 3. *c.* 24., requiring annuities to be registered in order to confer a vote, is intituled, "An Act to *prevent fraudulent and occasional votes* in the election of knights of the shire, and of members for cities and towns which are counties of themselves, so far as relates to the right of voting by virtue of an annuity or rent-charge." The preamble recites, "Whereas annuities or rent-charges granted for a life or lives, or a greater estate issuing out of freehold lands or tenements, are of a private nature, and therefore *liable to fraudulent practices* in elections, &c. to the prejudice of the candidates, and of them who have just right to vote at such elections." And by section 3. it is enacted, "That no person shall vote at any election of a knight, citizen, or burgess in England, in respect of any annuity or rent-charge to be *granted* after 1st June, 1763, unless a memorial of the *grant* of such annuity shall be regis-

" tered with the clerk of the peace of the county,
" riding, &c., or with the clerk of the peace,
" town-clerk, or public officer having the cus-
" tody of the records of a town or city, within
" which the lands lie, twelve calendar months at
" least before the election, the memorial to be
" under the *hand and seal* of the *grantor* or
" *grantors*, and attested by two witnessess, one
" whereof to be a witness to the *execution of*
" *such grant*, which witness shall prove the seal-
" ing and delivery of *such grant*, and which me-
" morial shall contain the day and year of the
" date, and *names, additions, and abodes of the*
" *parties* and witnesses, &c., and that every such
" *grant*, &c. shall, at the time of entering such
" memorial, be produced to such clerk of the
" peace, town-clerk, &c."

The obvious construction of this clause, and of the preamble and title of the act, shows that the enactment was only aimed at grants of annuities by instruments between living parties, made for the purpose of giving occasional votes, and that it could not be intended to apply to devises of annuities charged on lands by will; which appear neither within the mischief nor the language of the act. However, in the Bedfordshire case, [*2 Luders*, 502.] where John Hill claimed to vote for an annuity of twenty pounds a-year devised to him for life, issuing out of lands charged with it, the Committee held the vote bad, the

annuity not being registered within the act. It is to be observed, that it was also objected, it was not *assessed* in the voter's name, though the land itself was assessed in the name of the owner, and it is not known on which ground the Committee decided. The objection was also taken to Palmer's vote before the same Committee, [*Ibid.* 504.] and the vote held bad, but the counsel against the vote principally relied on *another* objection, that the freehold was not properly described on the poll. Pincard's vote was also rejected by the same Committee on the double objection, that the annuity which was devised by will, payable out of lands, was neither assessed nor registered. [*Ibid.*] In the case of Samuel Harrington, it was resolved by the Gloucestershire committee, that an annuity coming to the voter by devise need not be registered. "Resolved, *nem. con.* that the annuity for which Samuel Harrington voted, and which devolved to him in 1762, by will of John Dee, does not require to be registered." [*Heywood*, C. 235.] But it appears from a note in 2 *Peakwell*, 84, that this was not an annuity originally devised to the voter; but a fee-farm rent, formerly payable to Dee, and devised by him to the voter; and as this election was in 1777, and the annuity came to the voter in 1762, it would clearly be exempted from registration by the second section of the above act, which provides that annuities or

rent-charges "*coming to*" the voter by descent, marriage, marriage-settlement, *devise*, or presentation to a benefice or office, shall only require registration if the voter acquire them *within twelve months* before the election. This case, therefore, decides nothing as to the necessity of registering an annuity created originally by devise, which entirely turns upon the third section of the act above set out; the second section, I apprehend, clearly applying, not to rent-charges on annuities originally created, (since they could not be created by *descent* or by *marriage*, &c.) but only to old rent-charges or annuities devolving on the voter in the several modes mentioned.

Then, can the *third* section be held to apply to annuities created by will and charged on land? I humbly submit it cannot, since they are not within the spirit and object of the act, as it is impossible that they can be fraudulently granted or created, according to the preamble, to give occasional votes; and the whole tenor of the third section is inapplicable to them. It requires the "grant" to be registered, the memorial to be under the hand and seal of the "grantor or *grantors*," (a *joint will* was never heard of,) it speaks of "*sealing and delivery*" of the grant, and of the "names, and additions, and abodes of the *parties*," evidently alluding to instruments *inter partes*. This construction appears so mani-

fest, that it seems probable the decisions in the Bedfordshire case may have proceeded on the ground, that the annuities were not *assessed*, rather than that they were not registered; for it would seem that assessment would clearly be necessary, — as the act of 20 *Geo.* 3. *c.* 17. expressly enacts that no person shall vote in respect of any messuages, lands, or "*tenements*," which have not been charged or assessed to the land-tax, &c. Now, such an annuity clearly comes within the description of a "tenement;" and the second section of that act only exempts from assessment "annuities, or fee-farm rents *duly registered*." It would seem, therefore, that such annuities must clearly require either assessment *or* registration; and it appears to me that they fall properly within the Assessment act, and not within the Registration act.

[In the Middlesex case, 1804, (*2 Peck.* 85.) it was held, after much argument, that *fee-farm* rents must either be *assessed* as a freehold, or they must be registered as annuities, the land out of which they issue being in this last case likewise duly assessed.]

THE END.

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